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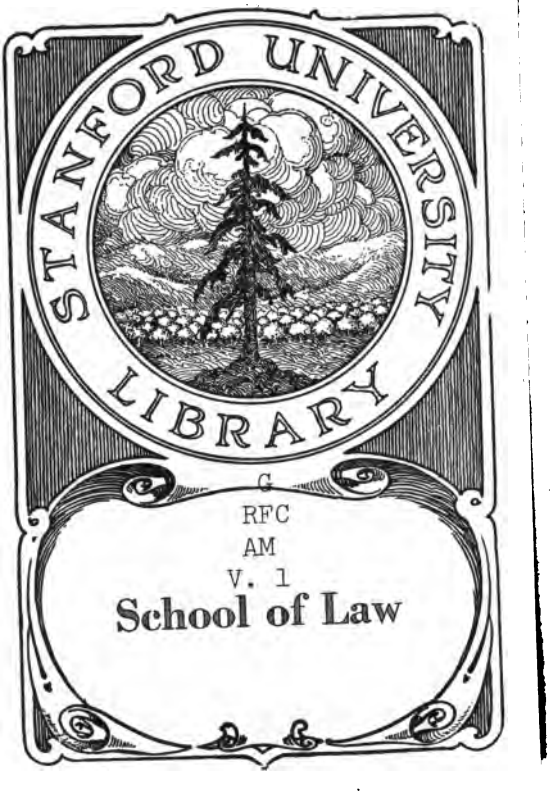
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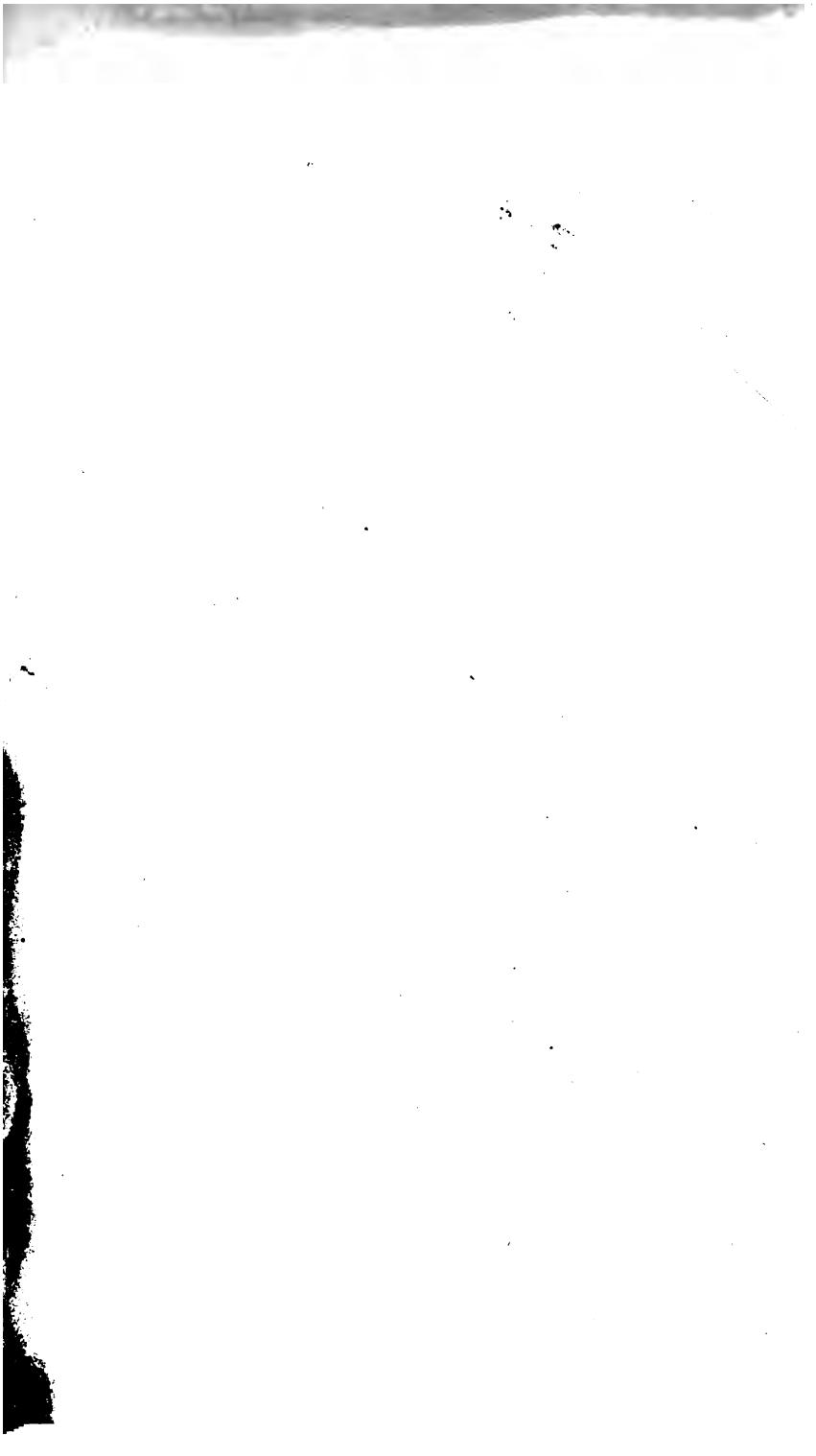
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Geo. B. Sawyer

Wiscasset 1876

2 vols

S.E.T.

Presented to Judge Washington as a small, but sincere Token of personal Esteem & Friendship; by his affte Hble Servt

Richard Peters

ADMIRALTY DECISIONS

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE

PENNSYLVANIA DISTRICT;

BY THE HON. RICHARD PETERS,

COMPRISING ALSO

SOME DECISIONS IN THE SAME COURT,

BY THE LATE FRANCIS HOPKINSON, ESQ.

TO WHICH ARE ADDED

CASES DETERMINED IN OTHER DISTRICTS

OF THE UNITED STATES.

With an Appendix,

CONTAINING—THE LAWS OF OLERON.—THE LAWS OF WISBUY.—THE LAWS OF THE HANSE TOWNS.—THE MARINE ORDINANCES OF LOUIS XIV.—A TREATISE ON THE RIGHTS AND DUTIES OF OWNERS, FREIGHTERS, AND MASTERS OF SHIPS, AND OF MARINERS: AND THE LAWS OF THE UNITED STATES RELATIVE TO MARINERS.

IN TWO VOLUMES.

VOL. I.

PHILADELPHIA:

PUBLISHED BY WILLIAM P. FARRAND.

ROBERT CARR, PRINTER.

1807.

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RICHARD PETERS, jun.

July, 1807.

ADMIRALTY DECISIONS

IN THE

DISTRICT COURT OF THE UNITED STATES,

IN AND FOR THE

PENNSYLVANIA DISTRICT.

PRIZE.

Richard Downing Jennings,
versus
The Executors of Joseph Carson, dec'd.

1792.

A neutral vessel captured by a privateer during the American war, and condemned in the court of admiralty of New Jersey. By the Court of Appeals of the U. S. condemnation reversed, and restitution, but not damages, ordered. Carson, one of the owners of the privateer, resided in Pennsylvania. The District Court of Pennsylvania* has jurisdiction over the case, and sustained the suit against the executors of one of the owners of the capturing privateer.

DECREE.

THIS is a case, in which the general principles are stated in the proceedings and exhibits. There are some circumstances, however, clearly ascertained by those exhibits,† which I shall have occasion to mention in the course of the observations I shall make on the merits hereafter. The libel complains of the illegal capture of the sloop George, and her cargo, the property of the libellant, then and now

* The jurisdiction of the district courts, in the several branches of judiciary authority allotted to them, is assigned by the 9th section of the "*Act to establish the Judicial Courts of the United States.*" vol. i, Laws, U. S. page 53. The words, important to this question are....." *and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.*"

† On a careful examination of the record in this case, I find that all the facts, material to this question are stated in the decree.—*E.*

Jennings, vs. Carson's Executors.

a subject of Holland, during the late war, to wit, in July 1778, by the schooner privateer Addition, Moses Griffin, commander, belonging to the testator Joseph Carson, and others, who are named in the answer of Joseph Carson, in his life time. It is alleged, on the part of the respondents, that the vessel captured was employed in carrying goods, belonging to the subjects of Great Britain, contrary to the regulations and laws of the then congress. They rely on the libel and condemnation in the state court of admiralty of New Jersey....The verdict of the jury, ascertaining the facts, and the condemnation by the court, and order of sale and for payment of nett proceeds to the captors....The sale of the vessel and cargo at vendue, and the monies being received by the marshal of the court, in whose hands, it is said, they now remain, in depreciated paper, not having been distributed to and among the captors, and of course the respondents, or their testator, received no part thereof; and therefore they allege that the marshal only is chargeable to the libellant, and not the respondents or the testator. They insist that there was probable cause of seizure, and therefore the captors are not answerable in damages. They also plead an abatement to the jurisdiction of the court, because they assert that the subject of prize or no prize belongs to the admiralty of New Jersey, and not to this court, which has no cognizance of the question, nor has it power to effectuate its judgment against executors. On the part of the executors, particularly, an answer was put in denying their being chargeable for the torts of the testator, which as well as their consequences die with his person. But, on an explana-

tion on the behalf of the libellant, that he claimed no damages for the tort merely as a tort, but sought for restitution of his property only, this point was abandoned by the advocates for the respondents. The libellant, to repel this defence, and denying in the usual form the facts as stated, sets forth the reversal of the judgment of the court of Jersey by the court of appeals of the United States on the 23d of December, 1780, which contains a direction to the latter court to make restitution of the property with costs but not damages. They also join issue on the point of jurisdiction; and distinguish between a suit commenced in the life-time of the testator, and one brought, in the first instance, against the executor. Five points were made by the advocates for the respondents....

1. The tort dying with the person.

2. The jurisdiction of this court is not competent, as it is not a prize court.

3 and 4. If a prize court, yet, as the cause originally attached in the court of Jersey, that was the only court in which the consequences are cognizable; and is alone competent to effectuate the decree of the court of appeals.

5. A capture with probable cause is not a subject of action for damages.

The first point being waved brings the question to the competency of jurisdiction, which, in order as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to enquire into the merits of the cause.

On this point, as it first struck me, I confess I had doubts. The account given by lord Mansfield of the arrangement of the court of admiralty in

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July, 1807.

Findlay et al. vs. the ship William.

is a wrong done to the nation so at peace, an insult on its sovereignty, and an invasion of its territorial rights.

3. That we are bound, by the laws of nations, to seek reparation for the wrong thus committed, as well on our own account, as to enable us to give satisfaction to a friendly nation, the property of whose subjects has been taken within our limits.

4. That all captures made within the territories of a neutral, either on land, in their ports or harbours, or on their coasts to a certain distance from the land, are unlawful, and ought by the laws of nations to be restored.

5. That the word *prizes* in the treaty means *lawful prizes*, and illegal captures are as none, so far as relates to the subject matter of the treaty, and, therefore, were not the objects of the contracting parties, at the time of making it: and it could not have been the meaning of the treaty to let captures in a neutral country pass without enquiry.

6. That this is not judging of the war between the neutral powers; it is an enquiry into an allegation of an invasion of territorial rights. Every nation is obliged to take care of its own preservation; it has a right to prevent any other injuring its security, and may make use of *force* to retaliate injustice, to prevent injury to its territory, and to punish the invaders of its privileges.

7. That we are bound by treaty to be at peace with the sovereign whose subjects and their property have been captured, and, unless restoration is made, and the property of these subjects protected, our engagements may be considered as violated. We are also bound to protect and defend the ships

and merchandise of Prussia, Holland and Sweden, if attacked on our coasts, &c. and if captures take place, to use our endeavours to cause restitution to be made.

8. That the best mode of causing restitution is through the courts of admiralty, by process *in rem*, when the capture is within their power. These courts proceed according to the laws of nations, and, in a government like ours, are the only tribunals that can properly be applied to. In despotic sovereignties, *force* may immediately be applied; but here ours is a government of *laws*, and our executive is not vested with the authority exercised by sovereigns in such cases. All he can do is to represent and negociate, and his representations may be slighted, and our government treated with indignity. If there is no power in this court to effectuate the purpose required, it does not exist any where. The reason why cases of admiralty adjudications and interferences cannot be produced, is that captures have seldom been carried into the ports of the injured neutral. And those who commit these outrages will take care not to put the property into the power of the injured, unless it shall appear they can do it with impunity. If they can dispose of their prizes here, they will not go to their own courts to have them condemned.

9. That though it is true that a remedy may be applied by negotiation and diplomatic discussion, and ultimately by *force*, yet the remedy through the courts of admiralty jurisdiction is a *concurrent one*. It is also the less liable to objection, as these are courts regulated by the laws and customs of all nations, and not liable to political bias, or entangled in

Findlay et al. vs. the ship William.

political considerations. They are also courts, to whose decisions, for reciprocal benefit, all nations pay a particular respect.

I have given this subject every consideration I am capable of, and have deliberated on the arguments and authorities brought forward by the advocates on both sides the question, with the attention they justly merit. But it seems to me that much has been said not immediately applicable to the only point I have now to determine, to wit,..... *Whether this court is vested with the power to enquire into the legality of the prize, and to investigate the fact on which all the reasonings are founded?* If this fact is established, *and the extent of our territorial limits ascertained*, so as to make it clear that a capture has been made within the territories of the United States, there is not a doubt but that a flagrant violation of the rights of neutrality has been committed.[a] And this is followed by many of the consequences mentioned by the advocates for the libellants, so far as they respect our national dignity and duty towards a friendly power, in endeavouring to cause restitution or recompence to be made. Nor does this seem to be denied by the other side of the question. But the embarrassment still exists. *Who is to enquire into the matter, and either give or attempt the redress?*

It is difficult for a neutral nation, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties, heated with the rage of war, and jealous of even common acts of justice or friendship on its part. Neither is it easy

[a] Vatell, l. 3, § 132, Lee. c. 9, p. 151.

for the nations at war to restrain their subjects from acts of violence, even in the territories of their friends. The least under control are those whose object is not honourable conflict, or patriotic exertion. These are actuated by a spirit of lucre, which, not only incites to plunder the base and lawless freebooter, but tarnishes even heroism, by seducing into unjustifiable actions the bravest men. It would be for the interest of nations, and the happiness of mankind, if, by universal consent, the quarrels of nations were prevented from being turned to the purposes of private advantage. But the swords of those who fight for gain will not, in our day, be beaten into ploughshares. We must take nations and men as we find them, and consider as lawful what those at war authorize, so far as it respects the parties engaged. After all, it depends much on the interest, the convenience, or the good temper of governments, whether a neutral shall or shall not be engaged in war. A prudent and just conduct, on the part of the neutral particularly, is the surest preventive. But how to evidence this, is a matter of consideration with those to whom the government is delegated. The simplest mode of evincing our impartial disposition, is to confine ourselves to the customs of other nations in our predicament; an over anxious zeal to avoid contests may otherwise lead us into errors; and, while we are endeavouring to avoid one rock, we may split on another. Mutual toleration must be exercised; for those who *are* at war, and those who *are not*, have their share of difficulties on this subject. Under this view of the matter before me, I have given a patient hearing to both sides; and have particularly attended to the arguments by

Findlay et al. vs. the ship William.

Findlay et al. vs. the ship William.

which it has been endeavoured to establish a jurisdiction in this court. It must certainly be allowed, by the advocates for the libellants, that they have not been able to shew any direct authority upon the point. For the two cases of the [a]*duke of Tuscany*, seizing the vessel committing the outrage near the port of *Leghorn*, and [b]that of the king of *England*, ordering restitution of the effects taken out of the houses of the inhabitants, and belonging to a ship of a friendly power, driven by its enemy on his shore, appears to have been *acts of power*, and not done in consequence of decrees or orders of courts of admiralty. Yet these jurisdictions existed, in both the countries above mentioned. The case of captain *Landy*, in the *American* frigate *Alliance*, who was ordered by the court of *France* to restore a ship taken by him, is not in point;[c] for the *Forsters*, who appeared as owners, were either subjects of, or persons resident and domiciliated in, *France*, and the ship was sailing under a passport of that nation. They, therefore, could not be considered as enemies; and, the capture not being *made from enemies*, the case was not comprehended in the treaty, or the capture authorized by the laws of nations. In the case falling under the notice of the king of England (except that of his having the powers of peace and war, as an appendage to which he might have exercised this kind of authority) I should not have supposed him vested, without an act of the legislature, with the authority he used; and it is doubted, by *Bynkershoek*, whether he did right in interfering at

[a] Lee. 131. [b] Bynk. c. 8, 177. Molloy. 85.
[c] Code de Pris. vol. ii, p. 877.

all on the occasion. If it be consistent with treaties, and otherwise right, our legislature can vest the executive in future with similar powers. I should suppose, too, that the liberty of selling prizes, in a neutral country, is not a perfect right; and may also be considered, by our national legislature, as a subject of regulation. If any captures are made within our limits, and the vessels or plunder is brought within our ports, the sale may be forbidden....They must then be either abandoned or carried within the jurisdiction of the captors, where the proper courts will consider of their legality. Yet this is a matter, not of judicial, but political arrangement; and must be left to those who have the authority to direct. The sovereignty of our nation is as complete as that of any other; therefore, whatever other sovereigns can do, we have in our power. But because, at this time, the authority, supposed necessary on this occasion, is not, as it is alleged, to be found in the executive branch, I do not see that the judiciary ought to exercise it, as a consequence resulting from political convenience, or the necessity of the particular case. This, I fear, would be a novelty dictated by our zeal, and might give cause of offence to one, while we were aiming at justice to ourselves, or gratification to the other. I hesitate not to use any plain authority I know this court to possess, let the consequence be what it may; but this is a question too important in its effects, to be acted on but on the surest grounds. I agree here, as I do in many of their other positions, with the advocates for the libellants, when they say that "courts of admiralty jurisdiction are less liable to objection, as these courts are regulated by *the*

Findlay et al. vs. the ship William.

Liberty of selling prizes in the ports of the U. S. may be controlled and forbidden.

U. States have similar sovereign powers with other nations.

Findlay et al. vs. the ship William.

Courts of admiralty being regulated by general usages and customs of nations should be cautious in their conduct.

laws and customs of all nations, and not liable to political bias, or entangled in political considerations." This should induce the greater caution in their determinations. I have not seen any proofs that "*the laws and customs of all nations*" warrant the interference of this court. If they do not, no authority can be derived from our own laws, if they were not silent on the subject. In the existing arrangement of our government, we did not calculate on our relative situation, as to contests between other nations. If, for this reason, no immediate remedy is at hand, who can justly censure the executive, when he has given decided evidence of his impartial and just inclinations? Who can with reason blame the judiciary, if they will not assume a power not conceived to be vested in them? Not the government of the country, whose subjects are the libellants, and to whom I wish every degree of justice may be done. The principles established in the decisions of their own courts, and the opinions of their most celebrated lawyers in the contest with the king of *Prussia*, in the case of the *Silesia* loan, in a great degree reach the point, as to judiciary authority in a neutral nation. In *Palache's* case, I am aware that it is only said the vessel "*was taken at sea*," But if not, it rather appears, that it would be more proper for a diplomatic than a judiciary examination. The general principle, as to the capture, is agreed; and is similar to that established in our treaty with France, which ought to have its proper weight. "[a] It was resolved, by the whole court of King's Bench, upon conference and deliberation, that the

[a] 4 Inst. 154. 1 Ro. Rep. 175.

Findlay et al. *vs.* the ship William.

Spaniards (whose ship had been taken by an enemy and brought into England, a friend to both parties) had lost the property of the goods forever, and had no remedy for them in England; and it relied principally upon the book in 2 R. 3, ubi supra, being of so great authority; for, by that book, he that will sue to have restitution of goods robbed at sea, ought by law to prove two things.....1. That the sovereign of the plaintiff was, at the time of the taking, in amity with the king of England...2. That he who took the goods was, at the time of the taking, in amity with the sovereign of him whose goods were taken: for, if he who took them was in enmity with the sovereign of him whose goods were taken, then was it no depredation or robbery, but a lawful taking, as every enemy might take from another." It is true that, by the laws and customs of nations, the capture, if taken in neutral bounds, is not lawful prize.[a] But I do not see that this court can get at that circumstance, *without holding plea as to the lawfulness of the prize.*

The district court cannot get at this case without enquiring into the lawfulness of the prize.

It is the original question, and not collateral matter, which determines jurisdiction. The courts of common law in *England* will not take cognizance of any thing arising out of the question, *prize or no prize*,[b] "because the original cause must all come into question again:" and yet the admiralty had determined that the ship was no prize.

This will be a proper subject of enquiry on the part of our government, or in a court of the country of the captor. Every nation has established these

[a] Woodeson, 443.

[b] Douglass, Rep. 612. Le Caux *vs.* Eden.

Findlay et al. vs. the ship William.

courts, and knowing that, if at war, they are answerable to a nation at peace, or in amity; if violations of territory happen in captures, care is taken to examine into this circumstance. If, on this account, the capture is illegal, it is so adjudged; and the party taking is liable to damages. Whether such damages shall exceed the amount of the security given by commanders of private ships of war, or whether one nation is answerable to another for injuries done by its subjects to others, contrary to or without its orders, is a matter in which there are differences of opinion among civilians,[a] and which it is unnecessary for me now to investigate. It is doubtless contrary to the instructions of the French government, that any of the ships, commissioned by them, act in a hostile manner in a friendly and allied territory. It is to be expected by one power from another, that her courts and her administration will do justice to the rights of sovereignty and neutrality. It will be the more to be lamented if a friend and ally should disappoint this expectation. But, should this be the case, it is not for me to say what proceedings should be had. I have subjoined to this decree some extracts from the "*expositions of the motives, &c.*" from the duke of Newcastle, the British minister's letter to Mr. Mitchell, the minister of Prussia, and from the report and opinion of Sir George Lee, Dr. Paul, Sir Dudley Rider and Mr. Murray, the late lord Mansfield, on the subjects I have mentioned, which are to be found in

[a] Lee 226, 227, 228, 229, 230, 231, 222. Grotius de J. B. & P. l. ii, c. 17, § 20.

Magens 463. 482. 487. 491. 496. 505.* Other authorities from British and other writers might be added, by which it appears, that when two powers have any difference between them, the affair must

Findlay et al. vs. the ship William.

* 1 Magens, 505. Each crown has no doubt an equal right to erect admiralty courts for the trial of prizes taken by virtue of their respective commissions, but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is by appeal to the superior court.

1 Magens, 491. If a subject of the king of Prussia is injured by, or has a demand upon, any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versâ*, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia's courts of justice.

If the matters of complaint be a capture at sea, during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience and the reason of the thing, and confirmed by long *usage*, do not allow of reprisals, except in cases of violent injuries, directed or supported by the state, and justice absolutely denied in *re minime dubia*, by all the tribunals, and afterwards by the prince.

Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful cases, different men think and judge differently, and all a friend can desire is, that justice should be as impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

1 Magens, 496. For as to the Prussian commission to examine these cases *ex parte*, upon new suggestions, it never was attempted in any country in the world before. Prize or no prize must be determined by courts of admiralty, belonging to the

Findlay et al. vs. the ship William.

be treated by negotiation, and not through the instrumentality of their courts of justice. That affairs of prizes are only cognizable in the courts of the power making the capture: these courts being

power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done to his subjects in these courts according to the law of nations, or particular treaties, where any are subsisting. If, in *re minime dubia*, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determinations. But there never was, nor ever can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way with the approbation of the powers at peace.

1 Magens, 487. By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the laws of nations and treaties.

The proper and regular court for these condemnations is the court of that state to whom the captors belong.

1 Magens, 482. First, that affairs of this kind are and can be cognizable only in the courts belonging to that power, where the seizure is made, and consequently that the erecting foreign courts or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in like cases, and therefore a proceeding which none can admit.

1 Magens, 463, sect. xlvii. When two powers have any difference between them, neither of them can on either side appeal to the laws of the country, because one of the two parties does not acknowledge them. The affair then must be treated in the way of negotiation from court to court, and the difference can only be decided with the consent of both parties according to the laws of nations, or by the means founded thereon.

Findlay et al. vs. the ship William.

Courts for trial of prizes made by belligerents cannot legally be erected in a neutral country.

generally styled courts of admiralty; and, that it never was attempted, before the subject of that controversy happened, to erect in a neutral state courts for the trial of prizes, taken by belligerent powers, even where neutrals were concerned; and that, of course, no court of one sovereign has a right to try the prizes taken by the ships, public or private, of another.* A dispute of this nature, in which the king of *Prussia* could not prevail, who, though weak at sea, was powerful at land, and had a propensity for war, would not very well suit us. We have, indeed, shewn that we know how to make war, but it is now our interest and inclination to cultivate the arts of peace. Much has been said, on both sides, to shew the importance of this cause, and the necessity of caution in its determination. I am sufficiently impressed with those considerations; but I feel myself at ease in this view of the subject. I am persuaded that any thing which affects the sovereignty and rights of our country will not be passed unnoticed by those who have the power to regulate our national concerns. On my own account, I have no disquietude; for no error of mine can affect the nation. There is an appeal, from any determination I may give, to a superior tribunal. I am anxious for the peace and dignity of my country; but not deeming myself authorized to decide in a matter growing

* See on this point the case of "the Flad Oyen, Martenson, master. 1 Rob. Adm. Rep. 114, Philadelphia ed. 137 English ed. In the case the question is discussed with great learning and ingenuity by Sir William Scott. See also the case "The Kierlighett Spoerwig" 3 Rob. Adm. Rep. 82, Philadelphia ed English ed. 29.—*E.*

Findlay et al. vs. the ship William.

out of the contests between belligerent powers, nor considering this court, in this instance, the vindicator of the rights of our nation, I leave in better hands the discussion on the subject of national insult, and the remedy for any invasion of territorial rights.* The *Instance side* of this court seems to

* When this cause was decided, no territorial limits were established by any national act. The facts were not accurately investigated. On the exhibition of the testimony, it did not appear to me to be clearly ascertained that the place of capture was left without doubt, as to its distance from the shore. The whole of the case was novel in the United States.

There is no point on which the writers on maritime laws and privileges so much disagree, as on that of the extent of the territorial rights of the sovereign possessing the shores, into the contiguous sea. All maritime people deem the nation in rightful possession of the coast, sovereign of the adjacent sea; yet there is no general agreement as to the nature or extent of this sovereignty. Time has not matured or settled opinions on this subject among jurists; nor have particular compacts established any general principle. From the period of the compilation of the digest of *Justinian*, to this day, the point has been uncertain, and open to controversy. Some early commentators on that work assert that the territorial sea extended 60 miles from the shore. A majority of ancient writers carry it to 100 miles. *Valin* endeavours to ascertain it by the *sounding lead;* whether the coast be composed of extensive shallows and flats, or bold and deep shores! Others fix the distance at the point capable of being defended from the shore. *Hubner*, the champion of neutral rights, thinks the limit ought to be the range of a cannon shot; and of this opinion is *Bynkershoek*, *Vattel* and other eminent civilians, and among them *Azuni*; who, in vol. i, p. 198 to 208, discusses the point, and cites many authors, and some treaties and documents. It seems to be a claim of power in extent, though of justice in its origin: and when viewed according to the contradictory opinions of writers, it appears difficult, doubtful, and often visionary. It is even left by some to the de-

Findlay et al. ve. the ship William.

Ship discharged; and plea to jurisdiction relevant.

have other objects; and a *Prize court*, called into activity when a nation is at peace, appears to be a solecism in jurisprudence. I do, therefore, decree, order and adjudge, that the libel in this

termination of those, whose wants, or convenience, require a greater or less distance from the shore. Some have need of more sea room for fishing; and *it suits* others to distinguish between extent for operation of revenue laws, and that for protection of neutral trade; the latter, these say, must be at the greatest distance. The range of a cannot shot is generally accounted about a sea league. Our act of Congress [vol. iii, p. 91.] fixes that distance, on the maritime territorial limits, for our nation: and gives the district courts jurisdiction to that extent, of captures made in violation of our territorial rights; by the law, passed *after the foregoing decree*, to wit, in June 1794, as opinions were various on that point, the extent might have been declared greater, without violating the pretensions or just claims of others. There is no doubt of the right (if they have the power) of any nation, to forbid and prevent captures, at a greater distance than the sea league from their coast. Nor can it be fairly questioned that, where coasts are indented, or firths or bays are included in the territory of a nation, what are called *chambers*, by Sir L. *Jenkyns*, may be established. These are parts of the ocean included within lines drawn from promontory to promontory, or perhaps from points a league distant from each. And it is not a question to be made by any other nation, whether some parts of the space included be or not more than a sea league from the shore. It seems, on the whole, a point for treaty or compact, or one left to the discretion of sovereign states. But, in fixing extent of maritime territory, they must not invade the rights of others; or pass into, so as to disturb or obstruct, the common *path-way* of nations, in its freedom of navigation. To this freedom all are entitled on the *high seas*, which are called the *high road*, through an expanse given by the creator, *to be held in common;* indivisible and incapable of allottment, in separate ownership, or propriety. In a case of similar circumstance, this subject was, at the time, discussed more at large. But the notes of that case (the Fanny) are mislaid.

Findlay et al. vs. the ship William.

cause be dismissed; and that the ship therein mentioned be discharged from the arrest, the plea in this case being relevant.

The case of the *ship William* became a subject of diplomatic discussion, which may be seen in the publications of that period, containing the correspondence between the then secretary of state, *Mr. Jefferson*, and the ministers of *France* and *England*.

Warder et al.
versus
Goods saved from La Belle Creole.

1792.

A French vessel *La Belle Creole*, on her passage from the West Indies home, was found by a Philadelphia ship, the *Amiable*, at sea, in a perishing and hopeless condition. The *Amiable* remained by the *Creole* at some risque, and with considerable delay; and took out the French officers and crew, who assisted in saving a part of the ship's furniture, and certain articles of the cargo, which were brought into this port; but the vessel was abandoned and left at sea. The goods were claimed as derelict, but this claim was dismissed, and one third of the gross amount of sales decreed as salvage.

DECREE.

THE state of the case will appear in the libel, and the testimony and exhibits in this cause.* The testimony, though in some points contradictory, and in many irrelevant, will shew, from a general view

* *The libel* states that, on the 10th day of November, 1792, the *Amiable* being on a voyage from Charleston, South Carolina, for Philadelphia, a ship was discovered in distress; upon which the Amiable shortened sail, changed her course, and found said ship to be *La Belle Creole*, commanded by *Davor*, bound to Bordeaux. La Belle Creole was declared to be sinking, and the master of the Amiable requested to remain by her, which was done by making light sail on board the Amiable. The distress of La Belle Creole continued; the weather was tempestuous, and on the 12th, after repeated solicitations from the master and crew of La Belle Creole, they were received on board the Amiable; and, before they left La Belle Creole, a proposition was made by them to burn her. On the master and crew of La Belle Creole leaving their ship, they declared they relinquished and abandoned her, and every thing on board of her. La Belle Creole was left without a living person on board of her. On the following morning she was again boarded by the master and crew of the Amiable, and a large quantity of merchandise taken from her. On the evening of the same day, at the request of captain Davor, she was set on fire. The Amiable afterwards arrived in Philadelphia. The libel prays a reasonable salvage may be allowed.

Warder et al. vs. Goods saved from La Belle Creole.

of it, the leading facts. I have, in addition thereto, examined the log-books of both ships, and find by the state of the winds and weather, as therein mentioned, that the Amiable was retarded in her pas-

A supplementary libel was afterwards filed, in which the goods are claimed by the owners, master, and crew of the Amiable, as wholly belonging to them "*as goods derelict and abandoned,*" and their delivery to the owners, &c. is prayed.

The claim and answer of captain Davor, master of La Belle Creole, state, that his ship was in great distress, and in danger of perishing; and that he, together with his crew, were taken on board the Amiable on the 15th day of November. That on that day, and before and afterwards, the mate of the Amiable, and some mariners belonging to her, *together with the crew of La Belle Creole*, saved the goods and materials libelled and claimed.

Captain Davor denies the *abandonment* of the ship and cargo, but declares an intention was entertained by him to repossess the same, should he at any time after be able so to do; and particularly denies the surrender of La Belle Creole, &c. to the master and crew of the Amiable; and asserts, that the said master and crew of the Amiable, at the period aforesaid, declared that all they saved was for the master and crew of La Belle Creole.

The claim and answer further state, that the master of La Belle Creole could not abandon the goods, &c. as they did not belong to him, but to persons in France; and that, even had they so abandoned them, the same being done under the impression of fear and danger, and from extreme necessity, could have no effect. It is also stated that, as the respondents were always in sight, or within reach of the property, and assisted in saving them, by the civil and maritime law they cannot be considered as *derelict*.

The respondents say they are willing to allow the libellants "a reasonable salvage, proportionate to their trouble and exertions."

Captain Davor states that the articles found in his trunks, not being merchandise, but money, furniture, &c. belonging only

sage, by the circumstances related in the libel; though, for some time during her stay with the *Belle Creole*, the winds were adverse. The distressed

to himself, and the mariners of La Belle Creole, are not by the maritime law and custom liable to salvage; he therefore prays, that the marshall be ordered to return the same to him, free of salvage and all charges.

By the depositions of the witnesses produced on the part of Warder and others, the principal facts, as stated in the libel, are established; and it is further stated, that at the time the master and crew of La Belle Creole were taken on board the Amiable, and before the greater part of the goods were saved, captain Davor ordered the ship to be burned, and this was only prevented by the interference of the master of the Amiable. It is further stated, that after the master and crew of La Belle Creole were received on board the Amiable, they lost sight of the said vessel, and, supposing she had gone down, the master of the Amiable determined to proceed to America. When the sun rose the next day, La Belle Creole was discovered, boarded, and the greater part of the articles saved were taken on board the Amiable. She had, at this time, eleven feet water in the hold, and the water was up to the cabin floor: on leaving her she was set on fire. It is also admitted in the depositions of these witnesses, that the crew of La Belle Creole assisted in saving the goods, &c.

After the arrival of the Amiable in Philadelphia, an attempt was made, by the officers of La Belle Creole, to bribe the mate, and one of the seamen of the Amiable, to assist in smuggling some of the articles saved.

In the depositions of the witnesses produced on the part of the respondents, some of the circumstances stated in the claim and answer are detailed; but no proof was offered in support of the assertion in the claim and answer, that captain Davor entertained any expectation, or intention, that he would, at any time, regain possession of the ship, goods, &c. One half of the cargo of La Belle Creole had been thrown overboard before the Amiable was spoken; and, but for her assistance, all would have perished.—*E.*

Warder et al. vs. Goods saved from La Belle Creole.

and hopeless condition of the *Belle Creole*, is described in her log-book, in the great points nearly according with the testimony. This log-book confirms, in many important points, the testimony on the part of the libellants, contradicts, in some instances, and supplies in others, facts omitted by the witnesses for the claimants and respondents. I do not find that the Amiable was in any real, though, like all vessels loitering on a coast, she was exposed to possible, danger, and unnecessarily protracted risque.

Points made by libellants.

There have been three points made in this cause.—

1st. Dereliction by the master.

1st. *Dereliction*, and a claim of the whole under

The following cases of SALVAGE *have been decided in the District Court of the United States for* THE DISTRICT OF NEW YORK. *The proceedings contain a clear statement of all the important facts in both cases.*

1797.

The brigantine Harmony found on shore on the Bahama bank, deserted and abandoned,—with very great labour, difficulty and danger, she was brought into N. York by the libellants. One moiety of the neat proceeds of vessel and cargo allowed as salvage.

Richard Concklin and others,
versus
The brigantine Harmony, her cargo, &c.

LIBEL.

"To the honourable Robert Troup, Esquire, judge of the district court of the United States for the district of New York. —The libel of Richard Conklin, owner of a moiety of the sloop Betsy, and master of the said sloop, Strong Conklin, owner of the other moiety and mate of the said sloop, Enoch Conklin and Nathan Smith, mariners on board the said sloop, against the brigantine Harmony, her tackle, apparel, furniture and cargo."

The said libellants give this honourable court to understand and be informed, that, proceeding on a certain voyage from New

words used by the captain, said to amount to an express abandonment; and, from the circumstances of the case, a *dereliction* by implication.

Warder et al. vs. Goods saved from La Belle Creole.

2d. That the delay of the Amiable, while attending on, and giving assistance to, and saving the goods out of, the Belle Creole, was a deviation which exposed to risque, out of the common course of the voyage, and would have forfeited any insurance which might have been made on the vessel and cargo, or either of them.

2d. The delay of the Amiable was a *deviation*.

3d. The *quantum* of salvage, if the first point should be determined against the libellants.

3d. The quantum of *salvage*, if the first point, against the libellants.

On the first point I have translated an authority out of Burlemaqui, which contains what I believe to be an accurate account of the ideas of the best writers on the subject of dereliction, and occupancy, consequential upon it.

Legal definition of *dereliction*.

"One may acquire, by the the right of the first "occupant, things which the proprietor has aban-

Providence for the port of New York, with a quantity of merchandize loaded on board the said sloop called the Betsy, *viz.* a large quantity of pine-apples and yams, of the value of five thousand dollars, or thereabouts, on the twentieth day of May last, in the Bahama straits, they discovered the said brigantine, called the Harmony, lying on a rank heel, with her sails flying, and main boom in the water, in great apparent distress, at the distance of about eleven leagues from the north-west point of Bahama island, on a certain bank of sand interspersed with rocks, which runs along the western and northern coasts of the said island. That these libellants thereupon made sail to the said brigantine, and, finding the same abandoned by the crew, were induced to go on board of the same. That, on examining the said brigantine, all her hatches, except the main hatch, being open, they found she contained a cargo consisting of sugar and molasses; but that

Warder et al. vs. Goods saved from La Belle Creole.

doned *with a design never more to hold them as his own.* Although one is not in possession of a thing, the right of recovery is not lost, unless it is renounced in a manner either express or implied. Hence the injustice of those countries which confiscate the property of goods shipwrecked, thrown overboard to lighten the vessel, or stolen, in place of returning them to the owners." The cases of dereliction, in which the maxim of *occupantis fiunt derelicta* is founded, generally run on the principle of a voluntary abandonment *by the owner*, with his free consent; and not on such a relinquishment as force, necessity, or danger, compel. The instances of wreck, or goods thrown overboard to lighten the vessel, may be given to elucidate this doctrine; and these are always recoverable, on payment or tender of *salvage*. It should seem that little prospect of recovery existed in the case of goods ejected, to lighten and save the ship; yet the right of recovery is not lost; but, on proof of property, they are re-

Goods temporarily lost, by *wreck* or ejection from necessity, recoverable on tender of salvage.

the same had not, as far as these libellants examined, been then considerably damaged; that there were no papers on board by which they could learn the names of the proprietors of the vessel; that they found six feet and a half of water in the hold of the said brigantine. And these libellants further shew that, determining to effect, if possible, the preservation of the said brigantine and her cargo, they immediately cast anchor at a small distance from the said brigantine, notwithstanding two rocks appeared above water, within two hundred yards of their station, and continued at anchor along side, or near the said brigantine, all that night and the three succeeding days; during which time these libellants, by great exertions of labour, and with severe fatigue, were continually employed in throwing the said cargo of the said sloop the Betsy

coverable, on payment, or tender of salvage, if either driven on shore, or taken *flotsam* or *jetsam*. If the evidence in this cause, supported (and I think it does not) the captain's consent to give the goods to the libellants, I do not consider it as binding on the owners; and, according to the authority from Burlemaqui, (and many others) it must be *the owner who abandons*. The captain is vested with certain powers, both express and implied, over the ship and goods, for certain purposes beneficial to the owner; such as the power of hypothecation—of compounding for part, to save the rest—detaining for freight —throwing over part to preserve the residue—but herein he has a qualified and not an absolute propriety. He may act, under the limited rights with which he is thus invested for *the benefit of the owner*, but cannot totally divest him of all the right, and transfer it, without special authority, even for a valuable consideration. He is inhibited, by the marine laws, to *sell* (though he may *pledge*) the tackle, or furni-

Warder et al. vs. Goods saved from La Belle Creole.

The owner alone can abandon.

Powers and rights of masters over ship and cargo.

May act for benefit, but not to divest right of owner.

Cannot *sell*, though he may *pledge*, goods &c. saved from shipwreck.

into the sea, and carrying and removing a part of the said cargo of the brigantine into the said sloop, and in pumping the said brigantine; by means whereof the said brigantine, on the twenty-third day of May, became buoyant in her fore part, and these libellants, by throwing out her anchor astern, and heaving with great and unremitted exertions on her cable, were enabled to bring round the head of the said brigantine; and, having cast out her sheet anchor at the whole length of the cable, threw from the aft part of the said brigantine a part of her cargo into the sea, whereby the said brigantine became afloat: and these libellants further shew that, on the evening of the said twenty-third of May, and the morning of the twenty-fourth, the weather being squally and tempestuous, these libellants returned to and continued in the said sloop near and about the said brigantine in

Warder et al. *vs* Goods saved from La Belle Creole.

ture saved from shipwreck, though necessary for the subsistance or payment of himself and crew: nor, even in cases of the *quantum* of salvage, should promises made by the master, in time of distress, be regarded; but the reward must be measured according to circumstances. Much less to be valued are the expressions he makes use of, tending to shew a *dereliction*, or abandonment of the property. I cannot, therefore, be of opinion that, in this case, there is an *express dereliction*, in the legal interpretation of the word.

Promises made by the master in time of distress not to be regarded.

As to the *implied dereliction*, there are no circumstances to prove it, but those which generally accompany such unfortunate cases. If these were to be taken as proofs of abandonment, on which the right of occupancy would attach, there would be an end to all enquiries relating to salvage, in instances of ships or goods forsaken. But the law is otherwise; and the ship, though forsaken, through fear of enemies, or to save the lives of the people, is not

Ships forsaken through fear of enemies, or loss of life, not legally derelict, so as to warrant full right by occupancy.

the most imminent danger, the wind blowing from different quarters, and sometimes upon the said bank. But these libellants, being resolved to risque their lives for the safety of the said brigantine, returned to the same and made sail upon her on the twenty-fourth day of May, the said vessel having then six feet and a half of water in her hold, and that part of her cargo which remained on board being very much shifted into the side, and causing the said brigantine to heel and labour very much in sailing. That, a strong current setting upon the bank, these libellants were again compelled to anchor with the said brigantine and sloop on the same day; and, continuing so at anchor, on the next day a certain sloop, called the General Green, commanded by captain Stein, bound from the Havanna to Providence in Rhode Island, fell in with these libellants, and, in con-

legally *derelict*, or even *wreck* or lost. I shall therefore dismiss, as untenable, the first point made in this cause, with the supplemental libel on which it arises.

Warder et al. vs. Goods saved from La Belle Creole.

As to the *second point*, which respects the *quantum* of salvage, and tends to shew the risque incurred, by the assistance given to the master and crew of the *Belle Creole*, to wit, *the deviation*, I should, in a case which I was under the necessity of determining, consider it as such. I am persuaded that the delay of the Amiable exposed her to uncommon danger: and, as it was not necessary, in the course of the voyage, for any purposes which insurers might have had in view, but was merely produced by the circumstances stated in the libel, it would, I think, have availed, in case of loss; to repel a claim of insurance. And the principle is the same, as to all consequences necessary to be considered in this cause, whether the owner remained his own insurer, or threw the risque on others, by a policy descriptive

sideration of twenty-three boxes of sugar, being part of the cargo of the said brigantine, which were then and there delivered to him by these libellants, in full satisfaction for assistance, was induced to cast anchor alongside of the said brigantine, and with the crew of his vessel to assist these libellants in stowing and trimming the cargo of the said brigantine, and pumping out the water therefrom. And these libellants further shew that two of the mariners on board of the said sloop, bound from the Havanna to Providence in Rhode Island, with the permission of the said captain Stein, and in consideration of the sum of two hundred dollars, paid to them by this libellant, Richard Conklin, undertook to assist in navigating the said brigantine to the port of New York; that these libellants, Enoch Concklin, and Strong Concklin, with the said two mariners, on the twenty-

Warder et al. vs. Goods saved from La Belle Creole.

What is deviation, as it regards insurance.

of the voyage. A *deviation* is not merely the unnecessary going out of the track, or course usually taken, but it is also a departure from either the express or implied terms of the contract. It needs not much reasoning or discussion to shew that delays for saving of ships, goods or mariners, producing uncommon risque, cannot be legal excuses on the part of the insured on policies as they are generally made. Such delays being breaches of the implied terms of the contract, by exposing to hazards not originally counted upon, foreseen, or in the contemplation of the parties. They are justified to the heart, though not (in this respect) to the law, on principles of humanity, commendable in themselves, expected from all, and particularly from those who are exposed to similar misfortunes. Ships with letters of marque may *chase* an enemy, but *cruising after prizes* incurs *deviation*. But, without entering into many particular references to cases or instances, it appears to me that all excuses for leaving

sixth of May last, took charge of the said brigantine, and weighed anchor, and arrived at New York on the seventh day of this present month of June, together with a considerable part of her cargo, on which day also the said sloop called the Betsy also arrived at the port of New York, with the residue of the said brigantine's cargo so saved from loss and destruction by these libellants as aforesaid. And these libellants further shew that, on their arrival at this port, this libellant, the said Richard Conklin, duly entered the said brigantine and sloop with their lading at the custom-house of this district of New York, and have since, together with Isaac Moses of the city of New York, auctioneer, and Nicholas Low, as their securities, become bound to the United States for the payment of the duties thereupon, and are now proceeding to land the same, delivering it as landed into

the course, or delays must be from necessity; and not with a view to lucrative objects. Putting into port by stress of weather—to stop a leak—obtain provisions, &c.—going out of the track to avoid an enemy—for convoy or other purposes—for the safety of the ship or goods, being beneficial to the insurers, are justifiable. But it is different in the case of cruizing for prizes, and cases of a similar nature, which might be mentioned; and none of them appear to me stronger than the one in question.

Warder et al. vs. Goods saved from La Belle Creole.

All excuses for going out of course must be from necessity.

On the third point I have taken into consideration all the circumstances of the case, and the law respecting it, so far as I can perceive it applicable. With respect to goods and merchandize, I can find no decided rules as to the proportion of salvage; those of the maritime laws, which have made any designations of proportions, varying from each other, and giving from a twentieth to a half, according to the description and value of the articles saved, and

3d point. *Quantum* of *salvage.*

No decided and fixed rule.

Proportions in maritime laws vary.

the possession of the said Isaac Moses, as a counter-security for the engagements so entered into by him, as surety for your libellants for the said duties; and to the end that he may keep and dispose of the same, under the direction of this honourable court. And your libellants do further shew, that a considerable part of the said cargo on board the said brigantine being damaged and perishable, it is the interest of those whom it may concern, that the same should be immediately sold: Wherefore, these libellants pray the aid and advice of this honourable court in the premises, with the customary process thereof; and that the said brigantine and the cargo thereof, so saved and brought into this port, may be sold by a decree of this honourable court, and that this honourable court will adjudge and decree to these libellants the whole or so much thereof, after deducting all charges,

Warder et al. vs. Goods saved from La Belle Creole.

the risk, labour, and expense of salvage. On plate, jewels and money, the salvage is the least; and on articles of other descriptions, according to circumstances. I find, however, that the former articles are not exempted, either from average, contributions, or salvage. The general principle is not confined to mere *quantum meruerunt*, as to the persons saving; but is expanded, so as to comprehend a reward for the risk of life and property, labour and danger, in the undertaking, as well as a *premium* operating as an inducement to similar exertions. It is laid down as a principle both of justice and policy, that "he who has recovered the property of another from imminent danger, by great labour, or perhaps at the hazard of his life, should be rewarded by him who has been so materially benefitted by that labour."

On plate, jewels, &c. salvage least.

Salvage not a mere *quantum meruit*, but exemplary reward.

I consider, in the case in question, the property risked by the owners of the ship *Amiable* combined with the danger to which her officers and crew were

and in such proportion to these libellants, as this honourable court shall think proper.

M'KINNIN, *Proctor for Libellants.*

DECREE.

THE court, having taken time to advise in this cause until this day, doth now order, sentence and decree, and it is hereby ordered, sentenced and decreed by the court, that out of the sum of fifty-six thousand five hundred and twenty-three dollars and thirty-eight cents, arising from the sale of the said brigantine Harmony and her cargo, and brought into court, the clerk pay the costs of the libellants, and those of the several claimants in this cause to be taxed, and also the costs accruing upon the petition of Thomas Sheafe to this court for a remission of foreign

exposed in the enterprise; and, though I do not depreciate the exertions of the officers and crew of *La Belle Creole*, yet all these exertions would have been useless, unnecessary, and impracticable, if the *Amiable* had not been present and exposed in the undertaking to risk, and her officers and crew to danger. The labour and difficulty, too, exercised and experienced by the latter, were considerable, and unremitted. The season of the year, and the place where the transaction happened, exposed the *Amiable* and her cargo to extraordinary hazard.

Warder et al. *vs.* Goods saved from La Belle Creole.

With respect to the proportion of *salvage*, all circumstances taken into view, I have, in the general, been guided by what I consider just in the present case, as well as politic in all cases. Combining both these circumstances together, I cannot have a better guide, nor one which ought to be more satisfactory to one of the parties in this cause at least, than the xviith article of book iv, chap. 19, of the Marine Ordinances of France, on the subject of wreck,

This being a *French* vessel the quantum chiefly regulated by a *French* ordinance.

duties charged upon the said brigantine and cargo, and also the fees and costs of the several officers of this court to be likewise taxed: and it is further ordered, sentenced and decreed by the court, that the clerk also pay to the collector of the district of the city of New York, out of the sum so as aforesaid brought into court, the sum of seven thousand seven hundred and sixty-four dollars and one cent, being the amount of duties secured to be paid to the United States upon the said brigantine and her cargo. And, as a compensation for the saving of the said brigantine and her cargo, it is further ordered, sentenced, and decreed by the court, that the clerk pay one moiety of the residue of the sum so as aforesaid brought into court, in manner following, that is to say, to the libellants Richard Conklin, and Strong Conklin, as owners of the sloop Betsey, one third part of the said

Salvage allowed.

Distribution.

Warder et al. v. Goods saved from La Belle Creole.

French ordinance on the subject of *salvage*.

which I have translated—"If the effects, however "wrecked, are found on the sea, or drawn from its "bottom, the third part thereof shall be immediately delivered, without expense, either specifically or in money, to those who have saved them, "and the two other thirds shall be kept to be delivered to the owners, if they shall claim them "within the time above mentioned; after which "they shall be equally divided between us and the "admiral, the costs of prosecution being previously "deducted from the two thirds."

Although I do not exactly follow, yet I have as nearly accommodated my determination to, this ordinance, as I think right.

I do therefore adjudge, order and decree, that the libellants in this cause, to wit, the owner or owners of the ship *Amiable*, and the master, first and second mate, the carpenter, and crew (including boys and cook) of the said ship, have and receive, in full satisfaction, for and as salvage, the one third part of the gross amount of the sales of the goods, wares

Salvage on the goods one third gross amount sales clear of all expenses and charges.

moiety; and that the clerk, after dividing the remaining two third parts of the said moiety into thirteen equal shares, pay four shares and a half to the said libellant Richard Conklin, four of the said shares being in consideration of his quality of master of the sloop Betsey, and the half of a share in consideration of the services rendered by his negro boy Charles in saving the brigantine and her cargo; and that the clerk pay three other shares to the said libellant Strong Concklin, as mate of the said sloop Betsey, and three other shares to the libellant Enoch Concklin, as a mariner on board of the said sloop Betsy, and who acted as master of the said brigantine after she was was got off the Bahama bank, and navigated her into the port of New York; and that the clerk pay the two remaining shares and an half to the libellant Nathan Smith as a mariner on board of

and merchandize, as mentioned in the account of sales rendered by the marshal of the district, free and clear of all expenses, costs, duties and charges whatsoever; and also the one eighth part of the appraised value and amount of the plate and money mentioned in the inventory, No. 2, to be divided among the said owner, or owners, master, mates, carpenter and crew, in the following proportions, to wit—

Warder et al. vs. Goods saved from La Belle Creole.

One eighth of plate and money.

Three fourth parts thereof shall be received and taken by *Jeremiah Warder* or the owner or owners of the ship Amiable, for his and their sole and separate use and property. That the remaining fourth part of the said *salvage* (which, though less than is common in a case of prize in war, is, I think, with their wages, sufficient; as the danger of conflict did not exist, which as to prizes adds to the risk, and increases the reward) shall be divided to and among the officers and crew of the said ship, in manner following, to wit, the said fourth part shall be divided into twenty-six equal shares or parts, whereof

Distributia.

	Shares
The captain shall and is hereby directed to receive - - - - -	8
The chief mate - - - - -	4
The second mate - - - - -	3
The carpenter - - - - -	2
And each mariner and the cook one share	8
Each boy half a share - - -	1
Amounting in the whole to -	26

the said sloop Betsey. And it is further ordered, sentenced and decreed by the court, that the other moiety of the residue of the sum so as aforesaid brought into court, be retained by the clerk to be paid under a future order of the court to the several claimants in this cause, according to their respective interests in the said brigantine and cargo, or either of them.

Wander et al. vs. Goods saved from La Belle Creole.

Plate, &c. restored on payment of the salvage.

That the plate and money shall be restored to captain Davor, for the use of himself and those of the French officers and crew of *La Belle Créole*, to whom the articles therein contained respectively belong, on payment of the proportion of the appraised value thereof, herein before decreed for salvage.

That the whole amount of the proceeds of the sales, of the goods and merchandize, as mentioned in the marshal's return, and account of sales, together with the salvage decreed on the plate and money, be brought into court; and, after paying thereout the one third of the amount of the former, and the salvage as aforesaid on the latter, the other

Morehouse et al.
versus
The Jefferson and cargo.

The sch'r. William fell in with the Jefferson at sea, in great distress, and took her master and crew from on board her—She was then abandoned. On the following day some of the crew of the William went on board of her, and, after great peril and exertion, brought her into New York. The district court allowed one half of the neat proceeds as *salvage*.

LIBEL.

To the honourable John Sloss Hobart, judge of the district court of the United States for the New York district.—

Humbly complaining shew unto your honor in this honorable court, Andrew Morehouse, James Ford, Elihu Carrington, and Rienhold Willenbrant, at present in the city of New York in the New York district, mariners, for themselves jointly, and separately, and also for Nathaniel L. Griswold and George Griswold of the same place, merchants, Noah Pratt, Jesse Lyon and Peter Jones, severally and respectively, according to their rights, interest and claims as hereinafter and hereby particularly set forth and made manifest, and as the same shall be judged right and decreed in and by this honorable court. That the said Nathaniel L. Griswold, and George Griswold, were at all the times hereafter mentioned the true sole and lawful owners of the American schooner called the William, which said schooner sailed from the island of Tobago in the West Indies, on or

two remaining thirds shall be subject to the following expenses and payments, which are hereby directed to be discharged and made forthwith.

Warder et al. vs Goods saved from La Belle Creole.

The costs accrued, and to accrue, in this cause, shall be fully paid and discharged, and all expenses incurred in the storage, and on the sale of the whole, as they shall be examined and taxed: and all duties and customs therein legally chargeable, and charged, shall also be paid thereout. After all the said costs and charges and duties shall be fully paid and discharged, the balance of the said two thirds shall remain in this court, subject to the further order, judgment and decree thereof.

about the nineteenth day of October, in the year of our Lord 1803, bound to the city and port of New York in the New York district, with a cargo of merchandize, the said schooner's crew, consisting of the said Noah Pratt, who was master, your libellant Andrew Morehouse, who was mate, and the other libellants James Ford, Elihu Carrington, and Rienhold Willenbrant, together with the said Jesse Lyon, who were seamen, and the said Peter Jones who was cook of the said schooner William, for the said voyage. And these libellants further shew, and give the court here to understand and be informed that on or about the fifteenth day of November in the year last aforesaid, while the said schooner William was on her said voyage from Tobago to this port of New York, and navigated as aforesaid, and in latitude by observation thirty-six degrees and fifty-five minutes north, at or about four of the clock in the afternoon, the said schooner William on the high seas fell in with a certain brigantine or vessel called the Jefferson of Newbury Port, commanded by one James Adams, which said brigantine, as the libellants were then informed, and believed to be true, was last from St. Bartholomews, and was bound to the port of New York in the New York district, with a considerable cargo on board.— And your libellants further shew and declare, that shortly after

Taylor and others, owners, and Heartwell and others, master and crew of the brig *Alexander*,
versus,
Goods saved from the *Cato*.

DECREE.

1806.

The brig Alexander, on a voyage from Havanna to Philadelphia, met the Cato at sea in distress, and took all her crew and some part of her cargo on board, and left her. Six days after she again fell in with the Cato—The crew of the Cato assisted in saving other parts of the cargo. Salvage claimed by the crew of the Cato, and half a share each allowed to those who had been active. About two-fifths of the gross sales allowed as salvage.

THE brig *Alexander*, Heartwell, master, laden with a valuable cargo, on her passage from the *Havanna* for *Philadelphia*, on the sixth of September last, met, on the high seas, with the ship *Cato*, Pyle, master, on a voyage from *New Orleans* to *Bordeaux*, in great distress, and on the point of perishing. The master and crew of the *Cato* were taken on board of the *Alexander*, with part of the cargo, consisting of 6 *seroons* of indigo, *thirteen bags* of coffee, and as much provisions as supported those of the *Cato's* equipage, while on board the *Alexander*.

the said schooner William fell in with the said brigantine Jefferson, the said James Adams came on board of the said schooner William, and informed that the said brigantine some time previously, and on or about the ninth day of the said month of November, at night, and while it was very dark and disagreeable weather, had been run foul of by a Spanish or French ship of war, and that the said brigantine had thereby lost a great part of her sails, rigging and spars, and was very materially injured, wrecked and broken in the hull, all which these libellants afterwards discovered, and therefore aver to be true.—And the said James Adams,

The *Alexander* then pursued her voyage; but on the twelfth of the same month, fell in again with the *Cato*, and found near her a vessel taking out goods. Captain *Heartwell* sent his boat, in which went captain Pyle, the second mate, and the boatswain of the *Cato*, and saved from the abandoned vessel 20 bales of *cotton*, 9 seroons of *indigo*, a *new hawser*, some *beef*, and other articles. It appears by the testimony, that "*it was blowing hard.*" The *Alexander* arrived in *Philadelphia* with the articles saved (a small part whereof consisted of articles of furniture, and apparel of the ship) and the master and crew of the *Cato*, on the 25th of the same September. It does not appear that any extraordinary risk was run, or exertions made. The time occupied in saving the goods was but short, "*a few hours*," at each meeting with the *Cato*.

Taylor et al. vs. the ship Cato.

This case, in all its essential features relating to

then also declared, that he and the residue of the crew of the said brigantine were determined, for the preservation of their lives, to leave and abandon her, and desired a passage on board the said schooner William to New York, which was consented to on the part of the captain of the said schooner.—And these libellants further shew, and give the court here to be informed and understand, that, in order to get a further supply of provisions and water on board the said schooner, so that the crews of both the vessels might have a supply on their passage to New York, your libellant Andrew Morehouse, together with two others of the seamen belonging to the said schooner William, went on board of the said brigantine to endeavour to get such supply from her, especially of water; but, in attempting to get water out of the brigantine into the boat, the cask was unavoidably stove, which frustrated their intention in that respect. And your libellants further shew, and for truth declare, that at or

Taylor et al. vs. the ship Cato.

the situation of the vessel, the mode of obtaining the articles saved, the assistance given by the crew of the deserted ship, and all the leading circumstances bears, by a curious coincidence, an exact resemblance to that of the *Belle Creole*, determined in this court in 1792.

But a dispute in this cause arises between the crew of the deserted ship Cato, and the salvors, the officers and crew of the brig Alexander.

The crew of the *Cato* insist on sharing the part to be allotted to the crew of the brig Alexander, on equal terms. They alledge that, by the knowledge of the master, and others of the Cato's equipage, who adventured in a second enterprise for saving, after the *Cato* had been left by the brig *Alexander* for several days, and again discovered, the most valuable goods were rescued from destruction by their position in the ship being pointed out. The master

about five of the clock in the afternoon of the same fourteenth day of November, being the fifteenth of that month by sea reckoning, the said James Adams the master, and all the crew of the said brigantine abandoned her and her cargo, and came on board the said schooner William, then on the high seas, bringing with them only the brigantine's boat, in which they came, with their chests of cloaths and bedding, and a small quantity of provisions. And the said captain and crew of the said brigantine Jefferson then declared, they would not return to her, nor make any further attempt to navigate her into port.— And these libellants further shew, and give the court to be informed, that, after the captain and crew of the said brigantine had so abandoned her, as aforesaid and came on board the said schooner William, on the high seas, it was thought most adviseable by the captain and crew of the said schooner, for them to endeavour to keep in sight of or near the said brigantine, du-

Taylor et al. vs. the ship Cato.

and some of the crew assisted in this salvage, at personal risks, while others of them navigated the brig *Alexander*, which would have been exposed to hazard, and perhaps loss, without these assistants; as the crew of the brig were incompetent to navigate and to save goods out of the *Cato* at the same time. It was said that assurances were given to the Cato's crew (at the time) of equal benefit of salvage.

On these points I must refer to the opinion I gave in the case of the *Belle Creole*, in which the same kind of circumstance and agreement occurred.

Much reliance was placed by the counsel for the crew of the *Cato*, who laboured to increase the quantum of salvage as a common concern, on the case of the *Aquila*, 1 Rob. 22, 35, &c. It is a mere difference of the interpretation of the word *derelict*, as it respects "boats, or other vessels, forsaken and

ring the night then ensuing, in order to see her situation in the morning; and, if opportunity offered, to attempt to save her and her cargo, or at least to endeavour to get a cask of water from her, and put on board the schooner William, as a further supply for the people then on board her, during the residue of the voyage; and, though this was attempted, they lost sight of the said brigantine during the night, and did not see her again until at or about the hour of eleven of the clock in the forenoon of the next day, when they saw her at as great a distance as she could be discovered, and considerably to windward, when the said schooner William was steered for, and about five of the clock, post meridian, came up with the said brigantine Jefferson, it being, by sea reckoning, the sixteenth day of November, and in latitude, by observation, about thirty-six degrees and fifty-five minutes north; but the sea being then rough, and the vessel rolling very much, it was deemed impracticable to get any

Taylor et al. vs. the ship Cato.

"found on the sea, without any person in them,"—which creates any shadow of distinction between the application of the word in the case of the *Aquila*, and my definition or understanding of the term, as given in the decree alluded to. Sir *William Scott* has the same ideas of the *civil law* meaning of *derelict*, to which a right in the first occupant attaches. The abandonment must be voluntary, and not produced by force or necessity. All maritime *derelicts* (vessels deserted) are subjects of salvage, and not rights *in toto*, acquired by mere possession. When I was under the necessity of deciding a variety of points on the subject of *salvage*, it would much have relieved me, to have seen the decisions of the cases of the *Aquila*, 1 Rob. 32; and that of the *Two Friends*, same, 228. There is so evident a coincidence of opinion, in the principal points so much laboured in several *salvage* cases here, that I was

water out of the said brigantine that night; it was, nevertheless, agreed upon, after consultation between the captain, mate and crew of the said schooner William, that the mate and three seamen of the schooner should go on board of the said brigantine, if practicable, and examine her situation, and thereupon to judge of the expediency and propriety of taking possession of, and endeavouring to navigate her into port; whereupon, your libellants went on board the said brigantine, and, after the best examination they could make of her situation, they returned to the schooner; whereupon it was agreed between the captain and the rest of the crew of the schooner, and your libellants, that your libellants should go on board and take possession of the said brigantine, and use their best endeavours to navigate her into port. And that the said schooner should endeavour to keep company with the brigantine, and render her what assistance they could towards getting her into port; in consequence of which agreement, your libellants, the said Andrew Morehouse,

the more confirmed in the decisions I then gave, by the concurrence of sentiment evidenced by Sir *William Scott* in both these cases, which I had not seen till long after my decisions on similar points. One point has never been stirred, as no occasion called it forth, *i. e.* that deserted ships and goods, where no owners appear, are *national droits*, paying salvage to those who find and save them. This excludes, however, all idea of *occupantis fiunt derelicta.* It will be seen there (and in other modern elementary writers and reporters) concisely stated that the old and unjust claims of nations to wrecks, jettisons, &c. &c. to the exclusion of owners, are now obsolete, as they were ever unjust. The old rule of allowing half to the finder, or salvor, of deserted vessels, jettisons, wrecks, &c. without regard to degree of merit, labour, or difficulty, has been long exploded, as hath also been the antiquated idea of its

Taylor et al. vs. the ship Cato.

Old rule of allowing half to salvors exploded.

James Ford, Elihu Carrington and Reinhold Willenbrant, with the approbation of the captain, and the rest of the crew of the said schooner, went on board of, and took possession of, the said brigantine, taking with them their cloaths, beds, bedding and such other necessaries as they wanted, and could be spared from the said schooner William. And your libellants further shew, and give the court here to be informed, that they then took possession of the said brigantine, twenty-four hours or upwards after she had been abandoned by her former captain and crew, as before set forth; whereupon, after having so taken possession of the said brigantine, your libellant, Andrew Morehouse, took the command of her, and, with the assistance of the other libellants, made what sail they could upon the said brigantine, and with great difficulty, and imminent danger, navigated her into this port of New York, in the New York district, where they arrived on the second day of this present month of Decem-

Taylor et al. vs. the ship Cato.

being necessary that some living animal should be found in a deserted ship. Any mark by which the property can be known is a sufficient designation of ownership.

The third article of the laws of Oleron[a] has been produced, together with the commentaries upon it, to shew that seamen saving from wreck are entitled to reward (where sufficient property is saved) beyond the amount of wages.

Seamen of a vessel in distress saving goods, &c. entitled to wages according to their services.

I never disputed this doctrine in the cases to which it seemed applicable. Seamen are entitled or not to *wages*, in cases of wreck, according to the merit of their services in that distressing exigency. Those *who do not assist*, do not receive their wages, which are lost by the *wreck*, and recovered in equivalent, by the services in saving. But the amount

[a] Sea Laws, 123.

ber, where the said brigantine, and all the cargo she had on board when these libellants took possession of her, as aforesaid, now are; the particulars whereof are not known to these libellants with certainty, but they were informed by the said James Adams, the former master of the said brigantine, before they took possession of her, as aforesaid, that the cargo consisted of eighty-three hogsheads of sugar, and two hogsheads of coffee; and these libellants know, from inspection, that a great proportion of the said brigantine's cargo consists of sugar, but they have not yet discovered any coffee on board as part of the cargo, the said cargo not having been yet landed. And these libellants further shew, and for truth declare, that the said brigantine and schooner kept company, or in sight of each other with great difficulty, until about five of the clock of the afternoon of the seventeenth day of November last, when they lost sight of each other in a violent gale of wind, and never came in sight of

of wages recoverable is not precisely fixed; whether it shall be to the *time of wreck*, or for the *voyage*, is discretionary. Regard must be had to merit and to the value of goods saved. I have thought it best to make the allowance to the crew of the deserted ship as an increase of *the quantum* of wages in account between them and the owners of the articles saved. I have kept the cases of the actual salvors, *i. e.* the owners, officers and crew of the ship *saving*, and those of the persons *saved* out of the perishing vessel, distinct and separate. I do not say that there may not be a case where the reward should exceed any wages; but, I consider the vessel affording the means of saving the lives of the perishing ship's company and her cargo, and her officers and crew, as the real and substantial salvors. The others only act variously, and hold subordinate situations. Without the ship and crew which afford them re-

Taylor et al. vs. the ship Cato.

In some cases a reward beyond their wages.

each other again until they respectively arrived in this port of New York: and these libellants further shew, and give the court here to understand, that the said Noah Pratt, the captain, and the residue of the crew of the said schooner, did all in their power to keep company with the said brigantine, and to render her and these libellants assistance, until the said vessels were parted in a gale of wind, as aforesaid; when, having entirely lost sight of the said brigantine, and there being no reasonable prospect of again falling in with her at sea, the said schooner made the best of her way to the port of New York, being the port of her destination, where she arrived on the twenty-fourth day of November last.—Wherefore, these libellants pray due process of law, against the said brigantine, called the Jefferson, her tackle, apparel and furniture, and all and singular the cargo so taken possession of and brought into port, and saved as aforesaid, and against all and every the owners and owner thereof, or any

Taylor et al. vs. the ship Cato.

fuge and safety, of what avail would be all the efforts of the equipage of the perishing ship? The latter are bound, by every tie, to afford the former all assistance to return an obligation; and they are legally bound to assist in saving the goods to revive their claim to wages. What the amount shall be is to be considered as between them and the owners. They are not on a footing with the crew of the auxiliary vessel mentioned in the case of the *Aquila*. These had neither duties to perform or obligations to return. Yet they were placed in a secondary grade of merit.

In this case a degree of generosity has been evidenced by the *salvors*, who gave up to the crew of the *Cato* such of their private adventures as were in part saved. Another vessel, of the same owner, was found at the *second discovery* of the Cato, saving of goods, and keeping her from going down. I have heard of no claims brought forward on the part of this vessel. On the whole, I deem it best for the crew of the Cato, not herein provided for,

part thereof; and that they be duly cited to appear and answer the premises, and to perform such order and decree touching the premises as it shall seem meet to this honorable court to make; and that the said brigantine, her tackle, apparel and furniture, together with all and singular her cargo so saved and brought into port, may be sold in pursuance of a decree or order of this honorable court; and that the proceeds of such sale or sales, or such part or portion thereof, as shall seem just and equitable, may by virtue of an order and decree of this court be adjudged and paid over to your libellants, or to them and such other person and persons as by means of the premises shall be deemed and adjudged entitled to salvage or compensation out of the same; and that your libellants, and others interested in the said property, as salvors thereof, may have such further or other

to apply by petition for a distribution of the remnants and surplus, when their case, as between them and the owner, will be considered. I do not exactly recollect by what rule I estimated the quantum of the wages I ordered to be paid out of the surplus to the officers and crew of the *Belle Creole*, but I think it was beyond the wages due at the time of abandonment of the vessel. The officers of the vessel also had their private property restored. On some they paid a small salvage. I considered the captain as entitled to wages in quality of an auxiliary salvor, having a *lien* on the articles saved.

Taylor et al. vs. the ship Cato.

Captain of abandoned vessel entitled to wages out of articles saved, he having assisted in saving the goods.

There is a mistake, evidenced by some of the counsel in this, and other salvage cases, as to the principles regulating the payment of wages to seamen in cases of wreck. The old law was, that they were payable only out of such parts of the wreck of the ship, her tackle and furniture, as were

relief in the premises as law and justice may require, and as to this honorable court shall seem meet.

And your libellants will ever pray.

RIGGS, *Proctor.*

A. HAMILTON, *Advocate.*

NEW YORK, *Dec.* 7, 1803.

ANSWER AND CLAIM.

THE answer and claim of Gilbert Robinson of the city of New York, merchant, for himself and James Brown his co-partner, together composing the firm of Gilbert Robinson, & Co. consignees of eighty hogsheads of Muscovado sugars, shipped on board the brigantine or vessel, called the Jefferson, for and in behalf of George Cruden and company of the island of St. Lucia, merchants, the owners of the said sugar,

Taylor et al. *vs.* the ship Cato.

saved, but it was found that under this impression the whole attention of the mariners was occupied in saving those articles from which they derived advantage; and to ensure these they suffered the goods to perish. Modern authorities are clear, that both *ship and cargo*, or such parts as are saved, are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials or furniture saved, should be exhausted before the cargo be made answerable. There is no foundation, in my recollection, for the assertion, that so much of the goods must be saved as will produce an amount of *freight* equal to wages. *Freight*, in cases of *wreck*, is not the rule, as it is in ordinary circumstances: *freight* and *wages* growing out of it, are lost by *wreck*, unless the goods are sent on to their destination. The claim of the sailor is not under his contract *for wages out of freight*, but in

By modern decisions *ship and cargo*, or such part as are saved, responsible for salvage.

and for and in behalf of the underwriters and all others interested therein, to the libel of Andrew Morehouse, James Ford, Elihu Carrington and Rienhold Willenbrant for themselves jointly and separately and also for Nathaniel L. Griswold, and George Griswold, Noah Pratt, Jesse Lyon, and Peter Jones against the said brigantine Jefferson her tackle, apparel, furniture and cargo.

THE claimant by protestation, saving to himself and all others for whom he claims, all right of exception as well to the truth as to the sufficiency of the said libel, for answer thereunto or unto so much thereof as it is necessary for him to answer, alleges and declares, that the said brigantine, called the Jefferson, being at the said island of St. Lucia, and bound on a voyage from thence to the port of New York, the said house of George Cruden and Co. did there ship and lade on board the same, eighty hogsheads of Muscovado sugars, marked and numbered

Taylor et al. vs. the ship Cato.

a new character, as *a salvor*, he regains a rightful claim to wages, restored by his exertions in rescuing the articles saved (whether parts of the ship or cargo) from the perils and loss to which the *wreck* had exposed them. The same principles apply in cases like that now before me.

Thus far I had proceeded with intent to close my observations, under the idea that the claimants in the *Alexander* had acquiesced in the decision in the case of the *Belle Creole*. But I found, on a second hearing, that their views were extended beyond the proportion of salvage given in that case. Much reliance was placed on precedents of greater proportions in other cases, determined both in England, and in the United States. But precedents seldom apply as to *quantum*. The whole subject is open to *discretion*; which is seldom alike in different individuals, determining on similar circumstances. It

as follows, to wit, B. I. No. 1 to 80, for which a certain James Adams, the then master of the brigantine, did then and there in the usual form, sign and deliver regular bills of lading, binding himself to deliver the same at New York to this respondent and his co-partner, by the description of Messrs. Gilbert Robertson, & Co. merchants there. That the said George Cruden & Co. did shortly afterwards forward to this respondent and his co-partner, under the firm aforesaid, two of the said bills of lading subscribed by the said James Adams; and, by invoice and letter of advice bearing date respectively on the tenth and eleventh of October last past, did assign the same to this respondent and his said co-partner, under the firm aforesaid, to be sold for the account and risk of the said George Cruden and company, as by the said bills of lading, invoice and letter in the possession of this respondent, ready to be produced to this honourable court, may appear.

Taylor et al. vs. the ship Cato.

Feb. 1804.

very rarely happens, that cases resemble each other so nearly as the present and that of the *Belle Creole*.

The case of the *Blaireau*,[a] determined in the supreme court of the United States, was now, and not before, produced. It was relied on by the counsel for the salvors in the *Alexander*, as well as the counsel for the crew of the *Cato*. It is very easy for counsel, among the items of inducements to salvage, to enumerate that of the value of property risked. It will appear that I have, in no instance, disregarded this circumstance; but it is difficult for any one to fix the proportion of weight it should have in the final adjustment; more than it could be with any accuracy ascertained, what was the relative value of exertion between a strong, or less athletic individual. It has never struck me as forcibly as its advocates seem to consider it. Extended as far as some have carried it, the whole value of the articles saved, with a sum paid in addition, would not compensate for the risk. But a leading and do-

Principles by which salvage should be regulated.

[a] 2 Cranch. Rep. 240.

And this respondent further answering saith, that he hath been informed and believes, that the said brigantine, having on board the said eighty hogsheads of sugar, did set sail and proceed on the said voyage, and, in the prosecution thereof, did fall in with the said schooner, called the William, and that she was navigated and brought to the said port of New York by the libellants, but under what circumstances of risk or danger this respondent is ignorant.

And this respondent submits himself in the premises to the judgment of this honorable court, and humbly prays that the said eighty hogsheads of sugar may be discharged from arrest under the process of this honorable court and may be restored

minant consideration ought to be, *the benefit arising to the owner.* This may be afforded by a *coaster* of small value, as well as by an *East Indiaman.* The owner of the goods saved should pay *salvage* in proportion to his property saved, and the advantage *he* receives, adding a reward as an example and incentive to others, and not according to the *property of the salvor.* I cannot depreciate the services performed by the officers and crew of a vessel of small value, in any thing like the proportion of value of a vessel and cargo of great amount. All such considerations render the subject difficult, arbitrary and uncertain.' In the case of the *Blaireau*, there were great varieties of opinion, as will ever happen where no rules are, or can be, immutably fixed, between the judges of the several courts, on important points.

In one of no small import, I know that one of the judges of the supreme court (Washington)

to the possession of this respondent and his said co-partner, for the use of the owners thereof—And that this respondent may be hence dismissed with his reasonable costs and charges in this behalf sustained.

GILBERT ROBERTSON.

T. L. OGDEN, *Proctor for Claimants.*

Sworn in open court this twenty-seventh day of Dec. 1803.

EDWARD DUNSCOMB, *Clerk.*

DECREE.

THE court having taken time to advise as to its decree, and as to the proportion and distribution of salvage in this case, doth now order and decree, that the said cargo of the said brigantine

Taylor et al. vs. the ship Cato.

on the point of *Toole's participating in salvage*, differed from all the others; he thought him not entitled to a share. It is not therefore surprising that *in this court*, it should be found impracticable to fix satisfactory rules either for the payer or receiver of salvage; both being generally discontented. Merchants give as little satisfaction as courts. Few salvors or owners give themselves the trouble of gaining information, farther than the immediate object of pursuit. Many years ago a case of salvage, of considerable importance, was referred by consent to three of the principal merchants in Philadelphia. They reported in favour of the salvors about $160; when no court could have been justified in decreeing less than ten times that sum. It was for me an unlucky decision, for no case of salvage, originating in this court, has been since referred to merchants.

Jefferson, and every part thereof, mentioned in the libel filed in this cause, be and the same is hereby condemned, pursuant to the prayer of the said libel, and that the same be sold by the marshal of this district, at public auction in the city of New York, to the highest bidder, or for the best price that can be got for the same, after giving at least four days notice thereof in a newspaper, entitled the Daily Advertiser, and one other of the public newspapers printed in the said city; and that the said marshal have the monies arising from the said sale, together with the writ at the next district court of the United States, to be held for the district of New York after such sale, and that he then pay the same to the clerk of this court. And it is further ordered, sentenced and decreed by the court, that one moiety or equal half part of the nett amount of sales of the said cargo, (after deducting the duties on the cargo and the costs and charges which have accrued or may accrue in this cause, by

Amount of salvage.

SALVAGE.

Taylor et al. vs. the ship Cato.

There is now a better, though not yet a perfect understanding of this subject, among traders. Liberality and attention to general interests must qualify particular pursuits after gain. Cupidity, always disposed to be bribed, must have a douceur to unlock the generous feelings of the heart. But if salvors are too grasping, owners will err in refusing an adequate reward. They will suppose that they might as well abandon the property to the first occupant, as to suffer it to be consumed in remuneration and expenses.

I perceive in the decision of the case of the *Blaireau*, no opposition to the general principles of my decrees on this subject, on former occasions. I shall deem myself controlled by it, wherever I differ in opinion. The reward to *Toole*, was given from the peculiarity of the circumstances; this is always discretionary, and governed by the facts of every

reason of the libel, claim and petition filed in this cause) be paid to the libellants in this cause, or to them and the said Nathaniel L. Griswold, George Griswold, Noah Pratt, Jesse Lyon and Peter Jones, or their proctor by way of salvage; and that the same be distributed in manner following, that is to say, one equal half part of the said moiety or salvage to be paid to the said Nathaniel L. Griswold and George Griswold, the owners of the schooner William and part of her cargo; and to the said Noah Pratt, the master of the said schooner, and owner of the other part of her cargo, according to their respective interests therein; and that the other half of the said moiety or salvage be divided into two equal parts, the one half of which to be divided equally between the said Noah Pratt, the master of the said schooner William, and the said libellant, Andrew Morehouse, who acted as master of the said brig, and navigated her into the port of New York; and the other half to be divided into five equal parts, or shares, one

Distribution.

Salvage decreed to master of the William, as *owner of part of the cargo.*

Taylor et al. vs the ship Cato.

case: he received no wages in addition; he was remunerated for his uncommon exertions precedent to the salvage, as well as those made in navigating the wreck under great perils, during a long passage. I do not perceive any peculiar merit in the crew of the *Cato*, comparable to that of *Toole*. I join in feeling the policy and humanity displayed by the *Chief Justice* in behalf of the court, when the amount of property risked was held up to encrease the quantum of salvage, and doubts expressed as to loss of insurance by such risk. I said in the case of the *Belle Creole*, that it was a risk "justified to the heart, but not to the law." I can find no adjudged case declaring the delay or deviation to save lives or goods, not to be a forfeiture of insurance. The argument of the *Chief Justice* in delivering the opinion of the court (Cranch p. 268, 269.) may be considered as deciding the point so far as was incidentally required, in the case before the court. He alledges that the owner is made "*his own insurer*," which seems to decide that if others had taken his

of which to be paid to the said libellant James Ford, one to the said libellant Elihu Carrington, and one to the said libellant Reinhold Willenbrant, who were seamen on board the said brig at the time of her said arrival at the port of New York, but were formerly part of the crew of the said schooner William; and one other of the said shares to be paid to the said Jesse Lyon, a seaman on board the said schooner William, and the other said share to the said Peter Jones, cook, on board the said schooner William, or their proctor. And it is further ordered, sentenced and decreed by the court, that the other moiety of the nett amount of the said sales be retained by the clerk of this court until the further order of the court respecting the same.

Taylor et al. vs. the ship Cato.

risk under common circumstances, this was a casualty not insured against, and a deviation putting the policy in jeopardy. Sir *William Scott* has made a similar and equally laudable declaration, on the subject of this risk, not creating a loss of insurance. It ought to be settled by the general consent of all merchants, in whatever capacity they find themselves, that these exertions to save life or property, should incur no loss to the salvors. It is for the general interests of commerce, that no discouragements should exist to deter from acts of humanity, which all in their turn may require. If it be agreed that this risk does not incur a loss of insurance, it lessens the *pecuniary merit* of the salvors; and diminishes the force of all arguments grounded on the amount of property put to risk.

Difference between this case and the case of La Belle Creole.

The case before me differs in no material circumstances from that of the *Belle Creole*, except, that the amount of the property saved is less. Some consideration may be due to this circumstance, though the case is otherwise one of no extraordinary merit. The *Amiable* loitered and risked with a view to further saving, after taking out the officers and crew of the *Creole* and some goods. But the second meeting of the *Alexander* with the *Cato*, was purely accidental, the gulf stream having wafted the *Cato* in a direction to be overtaken by the Alexander, driven from or retarded in her course, by adverse winds. Although it was said to have "*blowed hard*," it could not have been dangerous to a ship, when an open boat could live, and transport goods in safety. The delay of the brig was short; having been only "*a few hours*" at each meeting with the *Cato*. I therefore decree a compensation nearly in the proportion

Taylor et al. vs. the ship Cato.

allowed in the case of the *Belle Creole*. I throw all costs and charges on the gross amount of sales, and out of the balance, allow, for salvage, a fixed sum of fifteen hundred dollars.

This creates little difference, (though it throws some advantage in amount to the salvors, who risked as much to save less) between the proportion allotted in the case of the *Creole* and this case. I perceive that the superior court,[a] whose decisions direct all inferior jurisdictions, have considered the proportions established in the ordinance of *France*, quoted in the case of the *Belle Creole*, as just and exemplary in cases of maritime *derelicts*. I am therefore bound to respect this opinion, as directory, when cases are similar in circumstances.

In compliance with the principle established in the case of the *Blaireau*, I allow half the share of a mariner, to each of the officers and crew of the *Cato* who assisted in the second salvage. In this arrangement, I follow the example of Sir W. Scott, in the case of the *Aquila;* considering the crew of the *Cato*, only in a secondary character. The other mariners of the *Cato* are left on the footing I have usually placed them, by the decisions of this court before stated. But those who have saved their adventures *and paid no salvage*, are not to receive the half share. I give this half share to those, (except as before excepted) who were actually employed in the second saving, because the amount of wages due was inconsiderable.

The distribution of the salvage, among the owners and salvors, as formerly established, was ac-

[a] 2 Cranch. 1 Rep. 240.

cording to the agreements, or articles of ships, having letters of marque, and capturing prizes. I chose these for my guide, in preference to privateers, because they paid wages and had cargoes at risk. But the decision in the case of the *Blaireau*, seems to direct a less allowance to owners of ships employed in saving; and a portion of that, is allotted to the freighters or owners of the cargo—a remuneration not common, if ever before made. In this case, the owners claim a greater allowance as having risked the goods of the freighters. Only the owners of the brig Alexander, come forward to claim salvage in this case. In argument, it was said, they risked the goods and freight. I have heretofore, when the point has occurred between owners and freighters of ships, considered those who take vessels on freight or charter, as having only a qualified use of the ship, to wit, for the mere purpose of transporting their cargoes. But all advantages of salvage, I have supposed to belong to the owners of the vessel, who would be answerable to the freighters, if losses were incurred, without their assent to this extra-employment of the ship. If this opinion is controlled by the decision in the case of the *Blaireau*, I must yield to it. This will depend on its being a question decided for general direction, or only as it respects that particular case.

I have fixed the whole salvage at near two-fifths, following in a degree that case, though the amount saved was not proportionate to the risk, if that forms any rule. An accurate one cannot be established from this circumstance. I shall, where the amount is considerable, adhere to the rule taken in the case of the *Belle Creole*. My former mode of distri-

Taylor et al. vs. the ship Cato.

Salvage allowed to the owners of the Alexander.

buting among the owners of the vessel and the crew, seems to be controlled by the case of the *Blaireau*. There one third was assigned to the owner, and two thirds to the salvors. I think in the spirit of that case, the risk of the owners in this case, was more disproportionate to the amount saved. I therefore direct that one half the salvage be paid to the owners.

Out of the monies in court * (after deducting the sum decreed for salvage) the balance of wages due to the seamen of the *Cato*, to the time of their arrival at Philadelphia, will be paid. All the officers and seamen of the Cato will receive this balance. The half share, to those who actually saved the goods at the second meeting with the Cato, is an addition to wages to those persons whose adventures were not delivered to them, as before stated, free of salvage. If they pay salvage on their adventures, the half share must be paid to them. I believe these adventures, were among the articles saved at the first meeting with the *Cato*, and compose no part of the second salvage.

* This balance, as are all monies brought into court, was deposited in the bank of the United States. By a rule of the court, no monies are drawn from the bank but by a check, on which the order of the court is endorsed.

In the case of the *Belle Creole*, the French crew were paid wages with part of the balance in bank.

Ships and goods deserted, and found at sea, are national *droits*, if no owners appear. This is now law, and the old barbarous doctrines and practices as to these, *Wrecks*, &c. are obsolete. See 1 Rob. Case of the *Aquila*, p. 32, &c.

The produce of ships and goods unclaimed (after payment of *salvage*) is, it should seem, also a national *droit*. But there should be, as in several maritime countries, some time, and that liberal, fixed for claims by owners.

I do therefore adjudge, order and decree, that the libellants in this cause, have and recover in full satisfaction for and as salvage, the sum of fifteen hundred dollars.

Taylor et al. vs. the ship Cato.

This sum of fifteen hundred dollars was divided among the salvors by the decree, in the following manner. James Taylor, Isaac W. Norris and Larkin Milnor, the owners of the said brig Alexander, received one half of the said sum $ 750

Salvage allowed to the master and crew of the Alexander, and part of the equipage of the Cato.

The remaining half, was distributed amongst the master and crew of the brig Alexander, and Samuel Pyle master, and James Parlecatur boatswain of the ship Cato as follows, to wit,

John Heartwell master of the brig Alexander received 8 shares, or -	$ 300	
Thomas Newark, the mate 4 shares, or	150	
John Burkett seaman 1 share, or - -	37	50
Manuel Hers - - -	37	50
Andrew Guniss - - -	37	50
Charles Engram - - -	37	50
Antoin Frazer - - - -	37	50
Robert Williams, cook - - -	37	50
David Marshall, boy, one-half share -	18	75
John Williams, boy, - - -	18	75
Samule Pyle, master of the ship Cato	18	75
James Parlecatur, boatswain of said ship	18	75

SALVAGE—RESCUE.

Mathew Clayton, Robert Alexander Ardley, James Bowen, and Stephen Revel.—*Libellants.*
versus
The ship Harmony and her Cargo.—James Crawford and company, owners of the ship, in behalf of themselves and the freighters and consignees of goods on board.—*Respondents.*

DECREE.

The *Harmony* bound to Philadelphia from Great Britain, was captured by a French vessel of war, part of her crew, &c. taken out, and ordered to Rochelle. The libellants and others, seven in number, including two female passengers, rose on the French prize-master and his crew, ten in number, rescued the Harmony, and brought her into Philadelphia. One fourth of the whole value of ship and cargo allowed as *salvage.*

THE libel states, that the ship sailed from *Portsmouth in Great Britain*, on the sixth of April in the present year, under convoy, from which she parted on the twenty-second of May following, and while proceeding on her voyage to *Philadelphia*, to wit, on the twenty-seventh of the same month she was captured by a French corvette commanded by a captain Gallabert. That the captain of the *Harmony*, the officers, seamen and passengers, were taken on board the *Corvette*, except the libellants, who were suffered to remain in the *Harmony*, on board whereof were put three *French* officers and seven seamen, who were ordered to conduct her into *Rochelle in France.* That the ship being on her way to Rochelle, on the twenty-ninth of May, she having been forty-eight hours and upwards in possession of the captors, was recaptured by the libellants and the mate of the said ship *Harmony.* The ship and cargo are stated to belong to Messieurs *Crawford and Company*, of *Philadelphia*, and divers other citizens of Pennsylvania. The prayer is, for such part of the value of ship and cargo to be awarded to the libellants, as shall be found due, according to the laws of the

Clayton et al. vs. the ship Harmony.

United States or by the laws of nations. The answer of *James Crawford and company*, owners of the ship, in behalf of themselves and the owners and consignees of the goods, accords with the allegations of facts in the libel, as to the capture, but states that *Anne* and *Esther Collet*, two female passengers, were also left on board the Harmony. It also states, that considerable quantities of goods were plundered from the cargo by the *French captors*, the amount whereof, at the time of filing the libel, was unknown. The respondents allege, that *Brown* and *Revel* were articled seamen, that *Clayton* was a passenger, and had goods on board, as was also *Ardley;* but the latter was not an active party in the recapture, he having remained neuter. That the mate, *John Nelson*, was the principal author and agent in the recapture, to whose courage and abilities it was chiefly due; and that *Anne* and *Esther Collet* assisted, to the best of their abilities, therein. The respondents deny, that by reason of the premises, the libellants are entitled to salvage by the laws of the United States, or of nations, and pray, that the libel be dismissed with costs, &c.

The libellants reply, that, though *Clayton* had goods on board, to the value of three hundred pounds sterling, they were insured in London, and that *Ardley* had no goods on board, and was a party to the enterprise, and did co-operate in the recapture. They allow that *Nelson* exerted himself for the rescue the ship, but he could not have effected it, without their co-operation and assistance; but they deny that the recapture was chiefly due to his courage and abilities, or that he was the author thereof. They allege, that it was, in an essential

Clayton et al. vs. the ship Harmony.

degree, due to the courage, the arms and the abilities of the libellants, that the enterprize succeeded.

The testimony, of all the witnesses, concurs in the leading circumstances of the rescue, which was accomplished when the vessel had been forty-eight hours in possession of the enemy, by the joint efforts, of all the passengers and crew of the Harmony, left on board by the captors. There is no doubt, however, that some had more active merit and agency than others. The evidence with respect to *Robert A. Ardley*, is the least clear and intelligible. It would take up too much time to abridge the arguments of the counsel for the libellants, to whom I am obliged for many of the observations I shall hereafter make. It is contended, on the part of the respondents, that there is no positive law of the United States (the acts of congress only operating on the cases therein enumerated, and this is not one) or any adjudged case under the laws of nations, to warrant the claim of salvage, which is an imperfect right, like that to compensation for saving a house on fire, or goods in it—rescuing a person or his property from ruffians, robbers, &c. depending on the generosity of the persons benefitted. That the mariners are the servants of the owners, and are bound to recover the ship, whether wrecked or captured, or lose their wages, and they shall not be paid for doing their duty. That the passengers or some of them, had goods on board, and if they were insured, they had the profits, if saved, in contemplation; the personal liberty of all was an object worth the contest. None of these could be obtained without recapturing the ship and cargo, which remained the property of the owners, until brought *infra præ-*

Summary of the arguments of counsel.

Clayton et al. vs. the ship Harmony.

sidia of the captors, and condemned in a court of admiralty. It was conceded, that such condemnation would, in all probability, have taken place if the property had been brought within the power of a *French tribunal.* It was prevented, by the re-captors, from going into a *French port*, to benefit themselves, and not the owners; but, if the property was not changed by the capture, the libellants can claim no part, it being wholly in the owners of the ship and goods. If the capture made it enemy's property, and divested the rights of the owners, then the re-capture, if lawfully made, was *prize* to those who took it. Therefore, in either case there can be no right of salvage, nor is there any remedy either at common law or in the admiralty; there being no legal obligation on the owners to comply with such a demand. That it is dangerous to allow the principle of salvage, in case either of wreck or rescue by the crew: the mariners would, in one case, be tempted to run ships on shore; and, in the other, to submit to a trifling force, that, by saving the ship and goods, or recapturing them, they might obtain an unmerited reward. That, if there is an allowance for salvage in this case, a discrimination must be made between the *salvors*, and the *female passengers* should share the compensation given; from which *Mr. Ardley* should be totally excluded, as not being active, or any wise concerned in the re-capture.[a]

[a] Authorities cited by *Ingersoll* and *Lewis* for libellants.

2 Woodeson, 448. 432. 428—430. Molloy, B. 2, ch. 5, § 4. 19th Viner, 275. Lex. Mercat. 157. Wesket, 499. Kaimes's princ. Eq. 10—172. 2 Salkd. 654. pl. 2. Lee on Captures 97 to 100. 1 Lord Raymond, 393. Malyne's Lex. M. 119. 106. 108. Acts of Congress relative to captures, &c. from French.

SALVAGE—RESCUE.

Clayton et al. *vs.* the ship Harmony.

I think much has been said in this cause, tending to perplex, however unintentionally, a plain question, and, by no means relevant to the subject of enquiry. I did not anticipate, from counsel so truly respectable, such laboured opposition to compensation, under a plain principle of common law and common justice, evident to the most moderate understanding, and mentioned by *Lord Holt*, in the case of *Hartford, v. Jones*,[a] "He that serves another, ought in reason to be paid for his service." In the same case, this great and able judge, who was well acquainted with the general subject of laws, though peculiarly eminent in those of his own country, declares that, "salvors of goods cast away, and saved may retain for payment, as a carrier for his hire; and salvage is allowed by all nations."—See also 1 Lord Raymond, 393. It is unfortunate that books reporting admiralty adjudications are rare. If the proceedings of these courts were published, the respondents' counsel would, no doubt, have had it less in their power to make the objec-

[a] 2 Salkeld, 654.

2 Valin 258. 1 vol. Journals old Congress, 260. 2 vol. 13. 2 Burrows, 695. Lee on Captures, 78. 82. 2 Burlemaqui, 295. 15—18. Inst. of Ad. 503, 504, 12 Mod. 134. 2 Wilson 213. Brooke, Property, pl. 18. 38. Lee, 232—238. Salkd. 35.

By *Rawle* and *Tilghman* for respondents.

1 Emerigen, 123. 2 Valin, 713. Lee, 86. 8. 2 Woodeson, 456. Weaket, 17. Inst. Ad. 54. 4 Bac. ab. 616. 4 Com. Dig. 271. 16. Vin. 411. pl. 43.

Clayton et al. v. the ship Harmony.

tion, that adjudged cases, to establish the libellant's claim, could not be shewn. This assertion, however, is not supported. There are not only particular instances, quoted from writers on the laws of nations, but clear and decided opinions, from the most distinguished authorities, adduced to warrant the present claim: nor are instances wanting, of cases determined in the courts of this country, both of common law and admiralty jurisdiction, as well those of the United States, as of the individual States. Though the cases, similar in circumstances are few, as they but seldom occur, the principles of the claim are supported by many authorities.[a]

It is unnecessary to enquire into the motives inducing the *recapture*, or *rescue*. Speculative, or interested investigators, who, in analyzing the human mind, view the dark side of human nature, find that the best actions of men spring from *selfishness*. I do not envy them this discovery, or the humiliating reflections which flow from it.—It is enough for our present purpose, that the recapture has been made; and, that the owners of the ship and cargo have recovered their property to a very great amount. The benefit accruing to them, and not *the motives*, but *the services* of those, who, at the risk of their lives, and with highly meritorious exertions, restored, what would otherwise have been totally lost, are the leading objects of our present enquiry.

[a] See 2 Woodeson, 429 to 434. Inst. of Admiralty, vol. 1. 53—55. and authorities there cited. Lee on Captures, 95—100. 19 Viner, 275. Salkd. 35. 2 Valin, 258. Wesket, 499, and many others.

Clayton et al. vs. the ship Harmony.

In opposition to the claim of the mariners, the cook and the steward, and the same objection lies to the mate, it has been stated, that they were the *servants* of the owners, and bound to recover the ship and cargo, or lose their wages. To these they were entitled, up to the time of arrival at the last port of delivery and for half the period of stay there, though the vessel and cargo had been lost; so that the part of their wages, put in jeopardy by the capture, was a small object. Nor is the benefit derived to the owners the less, because, in serving them, the salvors regained their personal liberty, and, with it, some advantages to themselves. But it appears to me, that the contract between the mariners and the owners, was suspended * or (as it respects any thing occurring thereafter) dissolved by the capture. Nor was the recovery of the ship and cargo from enemies, any part of the original contract with the seamen.[a] I am confirmed in this opinion by *Bynkershoek*, 2 I. P. l. i, c. 20, who says in a case similar in principle, though not in circumstances, "The "owners and freighters of the vessel hired the ma- "riners for the purpose of *merchandizing only;* and "not to cruise for booty," This eminent writer puts the case of the company of a merchant ship, without commission, being attacked, and taking the ship assaulting them. He determines that the whole of the capture ought to go to the captors. In *England* there is a statute declaring how such capture shall be distribued, to wit, "That the officers and

The contract between owners and mariners suspended by capture, as to all claims for wages.

[a] 1. Rob. Adm. Rep. 234. Philadelphia Ed.

* See note in the case of the Fair American, Brevoor, master. Post. page 87.

Clayton et al vs. the ship Harmony.

mariners shall receive such share of the condemned ship and goods, as is usually practised in private men of war.[a] Whether the retaking be from pirates or enemies, does not alter the principles of justice; nor do I see any important distinction between a crew in another ship, taking or recapturing a vessel, or the crew and passengers of a ship, taken, vanquishing the captors and restoring the property; the latter, no more than the former, being under no obligation, thus hazardously, to serve the owners. As to passengers, there is no pretence of a contract, between them and the owners. In the enterprize there is more hazard and less means, and, of course, more merit in a recapture or rescue under the present circumstances, than in a retaking by an armed vessel, whether public or private. Be this as it may, the recaptors eminently served the owners, and "ought in reason to be paid for their services." There being then, clearly a right, the law would be very inefficient and defective indeed, if it did not give a remedy, but left the salvors at the *mercy*, or, as it is said, *generosity* of the owners. There is certainly a legal remedy, and it being a transaction within the jurisdiction of the admiralty, the remedy is here properly pursued.

No difference, in justice, whether rescue by ship's crew, or those of another vessel.

Passengers.

Under the foregoing view of the subject, it is useless to discuss the point, insisted on by the respondents counsel, of the property remaining in the owners, until a condemnation in a court of the captors. My opinion on this point has been given long since. Beside, there is no dispute here, about

[a] Woodeson, 434.

Clayton et al. vs. the ship Harmony.

the property; for on the restoration of it, the whole claim to salvage rests. It is a claim for *compensation*, and not a claim to *property*.

That the *French*, on the sea, are our enemies, I have, on a former occasion, given my reasons for deciding.* That this vessel and cargo would have been condemned in a *French court*, is not denied. I consider the recapturing, in the present instance, as certainly within the equity and principles of the prize acts, if I may so call them, of Congress, so far at least as to authorize the recaptors to consider the captors as enemies, from whom the spoil might be lawfully wrested. The rewards given by these acts to those within their terms, shew the

Captors *enemies* on the sea.

* In a case of *prize* on the capture of a French armed vessel.

The supreme court of the U. S. in the case of *Talbot vs. Seeman*, (1 Cranch. Rep. p. 1.) gave salvage to a ship of war of the United States, for the recapture of a Hamburgh vessel, out of the hands of the *French (France and Hamburg being then neutral to each other)* on the ground that the Hamburger was in danger of condemnation under the French arret of 18th January, 1798.

In the same case (Cranch. 31.) the court considered the situation of France and the United States, in the year 1799, as a state of *partial war*.

Sir William Scott has, in many cases, allowed salvage on *recapture* and *rescue* of *neutral* vessels from *the French*. See the case of the *American* ship, *The Two Friends*, M'Dougal, master. 1 Rob. Adm. Rep. 228, and a note to that case page 240. Philadelphia ed.—The case of a *Swedish* ship, the *War Onskan*, Biedumpel, master. 2 Rob. Adm. Rep. 246.—Also the case of the *Russian* ship, the *Eleonora Catharina*, Kreal, master. 4 Rob. Adm. Rep. 127. Philadelphia ed.—*E.*

sense of the legislature, as to all who are within their spirit and meaning. If it be granted, as it ought to be, that there is a similarity in principle between this case and that of ships and goods saved from wreck, I have no doubt that the same reasoning and law will apply. If there be a difference in the cases, it is favourable to the libellants; the legal obligations on the mariners continuing in the case of wreck, and not existing in that of re-capture. Although seamen are bound, if possible, to save a ship and goods wrecked, or lose their wages, they are also entitled to further compensation, by way of *salvage.*[a] In some countries they have daily wages, by special ordinances or practice. But in all countries they are allowed more than their wages; if the property saved warrants this extra claim. This allowance is variously determined, according to the circumstances of the cases respectively. I could refer to many authorities and marine regulations, in addition to those before cited to prove this position. Even *Wesket*, who probably was largely concerned in insurances, as an underwriter, allows this to be law, though as has been observed by the counsel for the libellants, he closes his chapter on the subject, *querulously.* As to others than mariners, saving goods or ships, their right to salvage is, unquestionably, just and legal. It is true that frauds and abuses may be committed by sailors, as well as others, let a general principle or practice be never so just. Vessels are run on shore to obtain the amount of insurances—but it is not argued from hence that no insurances ought to be made; or, that

Clayton et al. vs. the ship Harmony.

Legal obligations on mariners continue in cases of *wreck*, but not to rescue *captured* property.

Rewards beyond wages given to mariners, saving from *wreck.*

Not fixed but vary according to circumstances.

[a] Ante page 55.

Clayton et al. vs. the ship Harmony.

those who are *bona fide* entitled, should not recover. Those who do right, ought not to be deprived of their reward, because others have done, or may do wrong. No salvage would be allowed to fraudulent claimants.—It is not only dictated by the plain principles of justice, but it is highly politic to give the mariners, either saving from wreck or recovering by recapture, and restoring property, liberal salvage beyond a mere *quantum meruerint*. Abundantly more benefits will accrue to commerce, by encouraging recoveries of property lost, or in imminent danger, than will ever happen by any abuses arising from the establishment of a principle, so just in itself, and exemplary in its consequences.

No salvage allowed to fraudulent claimants.

Policy and justice of liberal salvage.

The business of this court has so much encreased, that I have found it not only useful, but absolutely necessary, to settle general principles, as well for my own convenience, as to facilitate the business of suitors. It is for this reason, that I have gone into the general subject so extensively. I add these observations, to those I made on claims to salvage, in the case of *La Belle Creole*, that this point in its general principles may be at rest, in this court, so far as depends on me.[a]

Classification of the salvors.

From a consideration of all the circumstances, it appears to me, that, according to the evidence and the situation and capacities of the male recaptors, they should be classed in the following order.

1. *John Nelson*, the mate. The cook, in a manner highly meritorious, first mentioned to the mate that "he did not think it right the ship should go to France." He may have expressed the first idea

[a] Ante page 31.

of the recapture, yet it does not follow that the mate had not conceived it, or that the cook was the author of the plan. It was sufficient for the mate, who reproved this venial loquacity in the cook, to find him ripe for the attempt. Animated, no doubt, by this favourable omen, the mate immediately proceeded to discover the inclinations of his intended coadjutors. Perceiving a proper desire to co-operate in all, except *R. A. Ardley*, who, for some cause or other, was kept entirely ignorant of the plan, he proceeded to combine and arrange the design, and advise and direct, as well as finally to take his share in the dangerous, but successful, attack on the French officers and crew. His nautical skill was indispensable, as well, to the favourable issue of the recapture, as ultimately, to render it of any use in bringing the ship into port; which is as much a part of the ground for a claim to salvage, as the act of recapture.

2. *Mathew Clayton*, a passenger, whose personal courage, ready assistance, when he had determined to co-operate, and successful combat with the chief officer of the prize, were among the leading circumstances, which contributed to the fortunate issue of the contest.

3. The cook, *Stephen Revel*, a man of colour, whose merit is very distinguished. His reward should follow the spirited and beneficial exertions of one, whose station in life does not always produce persons of such courage and good conduct.

4. *James Bowen*, the steward, a black, whose deserts in cheerfully undertaking, and bravely accomplishing, his part of the enterprize, entitle him to share the reward of such hazardous services. I

Clayton et al. vs. the ship Harmony.

have a pleasure in declaring, that these are not the only instances I have had judicially before me, of virtuous, patriotic, and spirited conduct, in men of the African race.

5. *Robert A. Ardley.* There is a contrariety of testimony as to *Mr. Ardley*—he was not previously acquainted with the plan of, or engaged as a combatant in, the recapture. When he received the blunderbuss (the only fire-arm then in possession of the victors) from the mate, is not clear; it was after the officers in the cabin were subdued, and a short time before the whole of the *French crew* were confined. He appears to have done as much as was expected of him, after confidence was placed in him. Perhaps, towards the close of the contest, his being armed, overawed those, who, though dismayed, had not entirely submitted. Through the passage, after the recapture, he took his share in the watch, and in guarding the prisoners, which enabled others to assist in navigating the vessel. These services, in which all the recaptors partook, were necessary to the final accomplishment of the design. The bringing the ship into port was an essential part; and there was constant danger of the *French crew* rising and retaking possession.

Conduct of the female passengers highly meritorious.

The female passengers, *Mrs. Ann Collet*, and *Miss Esther Collet*, I have not yet noticed. But I should do great injustice to their merit, if I did not mention them with high approbation.—The firmness of mind evidenced by both of these ladies, in the critical situation in which they were placed, is as honorable to them, as their humanity, in attending the wounded, after the contest was over: their risk, in case the attempt to recapture had failed, was

peculiarly great. *Miss Collet* was actively useful during the last scene of the enterprize, by taking the helm, when her services, in this essential part of the business was required in execution of the plan, with which both were made acquainted by the mate in its origin. Nor were they without their share of merit in the preparatory arrangements for digesting and executing the design. I do not estimate the circumstance of *Miss Collet's* obtaining from the Frenard commander of the *Corvette*, the return of *Mr. Clayton* and the Steward on board the *Harmony*. This was, no doubt, accidental, and without any view to the object their return ensured, but it is still a circumstance of good fortune to the owners, derived from her influence and address.—She lost, by the plunder of the *French crew*, the greater part of the goods she had on board.

Clayton et al. vs. the ship Harmony.

As to the *quantum* of *salvage*, I have taken into consideration all the circumstances—of value of the property—bravery in retaking—labour and risk in the recovery, and bringing into port. I have had some reference to the acts of Congress, and endeavoured to discriminate, as justly as I can, between the relative merits of the salvors. I have found, in all cases of salvage, that it is impossible to satisfy all parties, and therefore endeavour to satisfy my own mind. But I do not find this to be unattended with difficulties.

Quantum of salvage on what principles adjusted.

The appraised value of the ship is eight thousand dollars. The value of the cargo, according to the estimate made at the custom-house, is, deducting duties, ninety-two thousand eight hundred ninety-five dollars, sixty-nine cents—in all, one hundred thousand eight hundred ninety-five dollars, sixty-

Clayton et al. vs. the ship Harmony.

Salvage on recaptures by act of Congress.

nine cents. By the act of Congress, of July 9th, 1798, recaptured American vessels and cargoes pay salvage, not less than one-eighth, or more than one-half. By the act of March 2d, 1799, relating to public armed ships—American or friendly property in possession of the enemy more than forty-eight, and less than ninety-six hours, is liable to pay, on recapture, one-third part of the whole value. The expense of outfit was, no doubt, a consideration with Congress in fixing the salvage. I have taken less, than I otherwise should, to the present recaptors, as no such expense was incurred—I respect the principles of these regulations, though I am not bound to follow them exactly in the present case, which is not included in the acts. Considering the latitude allowed in the first act, of from one-eighth to one-half, without regard to time; and the fixed proportion of one-third in the second act, I have determined under all circumstances, to allow one-fourth part of the whole value of the ship and cargo to the salvors in full recompense for salvage, being the sum of twenty-five thousand two hundred twenty-three dollars, ninety-two cents. The wages of the mate, cook and steward, from the last port of delivery, to be in part of their shares of salvage respectively; and the costs and charges to be thrown on the remaining three-fourths.

One-fourth of the whole value of the ship and cargo allowed as salvage.

Wages from last port of delivery in part of shares of salvage.

Had all those concerned in the recapture joined in the libel, I should have distributed the sum allowed as salvage, in the following manner and proportions.

The whole sum to be divided into seven shares of three thousand six hundred and three dollars and forty-one cents each—whereof

Distribution.

1. *John Nelson*, the mate, to have two shares, or seven thousand two hundred and six dollars and eighty-two cents.

2. *Mathew Clayton* to have one share and an half, amounting to five thousand four hundred and five dollars and eleven cents.

3 & 4. The cook, *Stephen Revel*, and the steward, *James Bowen*, to have, between them, two shares, being seven thousand two hundred and six dollars and eighty-two cents, whereof the cook is to have three thousand eight hundred and fifty three dollars and forty-one cents; and the steward three thousand three hundred and fifty-three dollars and forty-one cents

5. *Robert A. Ardley*, half a share, or eighteen hundred one dollars and seventy cents.

6 & 7. *Mrs. and Miss Collett*, one share, or three thousand six hundred and three dollars and forty-one cents to be equally divided between them.

Therefore, I do hereby adjudge, order and decree, that the several libellants in this cause, have and recover the sums following, that is to say,

1. *Mathew Clayton* five thousand four hundred and five dollars and eleven cents.

2. *Stephen Revel* three thousand eight hundred and fifty-three dollars, and forty-one cents.

3. *James Bowen* three thousand three hundred and fifty-three dollars and forty-one cents.

4. *Robert A. Ardley*, eighteen hundred and one dollars and seventy cents.————The same to be in full satisfaction for their services, for the causes, in the libel mentioned. And I further adjudge, order and decree, that the said ship Harmony, with her tackle, apparel and furniture, and also her

Clayton et al. vs. the ship Harmony.

cargo aforesaid, be condemned, and that the same be sold by the marshal of this district, for the payment of the several sums of money herein before decreed to the libellants, respectively, and of the costs and charges, legally accruing in the premises.

SALVAGE—RESCUE.

John Christian Brevoor, master, and John Schier, seaman.
versus
The ship Fair American, and Stephen E. Dutilh and John Gourjon.

DECREE.

1800.

An American ship captured by a French privateer, and eight days afterwards, rescued by the libellants, and carried into a port of the United States. The vessel and cargo was sold, and afterwards a claim on the ship, and on the owners of the cargo, for salvage, allowed by the court.

THIS is a case of capture by a French privateer called *L'Enfant de la Grande Revenche*, of the ship, in the libel mentioned, and her cargo, and a recapture, from a prize-master and eight privateersmen, by the libellants, assisted by a certain *Anthony Fachtman*, the cook of the *Fair American.** The capture, recapture, and bringing into

* The *libel* states, that the ship *Fair American*, *Brevoor*, *master*, bound from Philadelphia to Havanna, was taken on the 8th day of October, 1798, by a French privateer, called, *L'Enfant de la Grande Revanche*. The officers and crew of the Fair American, with the exception of the libellants, *John Christian Brevoor*, and *John Schier*, and *Anthony Fachtman*, cook, of the Fair American, were taken on board the privateer, and a prize-master, six white men and two negroes, were placed in the Fair American, and her course altered, for Cape Francois.

On the 16th day of October, the libellants rose on the prize-master, and the French crew, recaptured the Fair American, and on the 26th day of October, arrived in Charleston, South Carolina, with the said ship, having the French prize-master, &c. prisoners.

The libel also states, that the ship Fair American was valued at Charleston, at thirty thousand one hundred dollars, and the cargo, at twenty-five thousand one hundred dollars, and that the

Brevoor et al. vs. the ship Fair American.

Charleston, are agreed in the proceedings, on both sides. The counsel for the respondents have done their clients *ample justice*, in objecting to evidence of facts, and the law arising upon them. But there is

cargo has been sold or disposed of, so that no process out of the admiralty court can be issued against the same. The libel, therefore, prays process against the ship, and that the owners of the cargo, Stephen Dutilh and John Gourjon may be summoned, and be obliged to pay, a reasonable salvage to the libellants.

J. INGERSOLL,
T. B. ADAMS, proctors.

10th *January*, 1800.

The *separate answer* of Stephen Dutilh, admits the arrival in Charleston, and the value of the ship and cargo, and that the cargo was disposed of in Charleston; but prays that the circumstances of the recapture of the Fair American be verified. That after information of the arrival of the Fair American at Charleston was received, application was made by the respondent to the Insurance Company of Pennsylvania, for a reasonable reward to the libellants for their services and exertions, and one thousand dollars were ordered by the Insurance Company, to be paid to the salvors. The answer also states, that the Fair American and her cargo, were abandoned to the underwriters, and were afterwards disposed of for their account, and for a less sum than that which is stated in the libel, that Stephen Dutilh became the purchaser of the ship, and that she had performed a voyage from Charleston to Hamburg, and back to Philadelphia, since the recapture, and before the filing of the libel.

The answer prays that the libel be dismissed, so far as regards the ship Fair American, and the respondent, with costs, &c.

RAWLE, proctor.

21st *January*, 1800.

sufficient evidence, legally admissible in such cases, to satisfy me, that this is a case of extraordinary merit, in which great gallantry and good conduct,

The *separate answer* of John Gourjon, admits the sailing of the ship Fair American from Philadelphia for Havanna, and her arrival at Charleston, having goods on board, belonging to the respondent, amounting, per invoice, to $12,973; but, whether she was taken by a French privateer, and afterwards retaken by the libellants, are not admitted.

The respondent states, that the ship Fair American arrived in Charleston, where a part of the goods were delivered to, and sold by, an agent for the concerned, employed by the libellant, Brevoor; but that a part of the goods, amounting, per invoice, to $ 2319 were embezzled, or otherwise lost, since the alleged recapture, by default of the libellants, or one of them. That the goods sold at Charleston, produced a less sum than their invoice cost.

The respondent further says, that previous to the filing of the libel, the underwriters on the goods, directed the sum of $ 903$\frac{55}{100}$ to be given to the salvors, for their exertions and services, which sum was offered to the salvors, and will be paid to them at any time.

The respondent further states, that he abandoned his interest in the cargo of the Fair American to the underwriters, who paid him the sum of $15,822$\frac{65}{100}$, the amount of their subscriptions, deducting charges; and that the goods were sold on account of the underwriters, and with the consent of captain Brevoor, one of the libellants, without any claim or process against the same for salvage.

As to the residue of the libel, praying process against the person of the respondent, in order to compel him to pay salvage, the answer states, that the court ought not to have cognizance of the said plea as affecting the person of the respondent, the court having no jurisdiction thereof, and therefore it is prayed that the court will not proceed further therein, and that the same be dismissed with costs, &c.

MOYLAN, proctor.

18th *July*, 1800.

Brevoor et al. *vs.* the ship Fair American.

as well as labour and suffering, were exhibited and endured. I leave the details of the case to be collected from the proceedings, the exhibits and such parts of the evidence of facts, as I shall notice, in my observations hereafter.

I have fully discussed the general principles of the law, on the subject of *salvage*, in former decrees.* It is not given as a mere compensation,

* See the case of Warder et al. *vs.* Goods saved from the Belle Creole, and the case of Taylor et al. *vs.* Goods saved from the Cato, ante.

The *replication* states, that the libellants are ready to verify the facts stated in their libel, by proof; and that it is true that the sum of $1000 was distributed among them by the agents of the respondent, S. Dutilh, the same having been allowed to them by the Insurance Company of Pennsylvania, but that the same was paid to them on the eve of their departure from Charleston, and when they had not an opportunity to protest against the same being received by them in full satisfaction of salvage for the ship, and the part of the cargo belonging to S. Dutilh; but that the respondents never did consent to receive the same, in full satisfaction of salvage.

And that the sum of $903\frac{55}{100}$ was offered to them by the underwriters, on the goods belonging to John Gourjon, in satisfaction of their claim for salvage, which was refused by them, as insufficient.

The replication further states, that although no proceedings had been instituted by the libellants before the filing of their libel, yet they have never abandoned or renounced their claim to salvage.

It further states that the libellants have no knowledge of the embezzlement, alleged to have been committed, or of any persons who were concerned in the same, protesting that they, the libellants, were not guilty thereof.

22d *July*, 1800.

The depositions confirm the statements contained in the libel, and establish the facts alleged in the replication.—*R.*

for labour and service. It is increased, far beyond this claim, as an *incentive* and *premium*, to stimulate others to meritorious and gallant exertions. I lament that these principles are not better understood, among our merchants. They would then, by more liberal allowances to salvors, preclude the necessity of legal adjudications; which create much expense, and seldom give satisfaction. But I am compelled to disregard all considerations, but those of my public duty, and sense of legal obligation and justice.

Brevoor et al. vs. the ship Fair American.

The points made in this cause by the respondent's counsel, were chiefly these following—

Points made by the respondents.

1. The jurisdiction of this court is only *in rem*—a delivery of the ship and goods saved, having been made to the owners, the lien of the recaptors is destroyed; and with it, their right to salvage; which grows out of, and is attached inseparably to, the articles saved. It is therefore, not a personal demand.

1. Jurisdiction of the court of admiralty only *in rem*.

2. The possession of the ship by Brevoor, is not such as to preserve his *lien*—He held it in a new capacity—He had parted with his possession, as recaptor, when he engaged as master, after the resale to Dutilh.

2. *Lien* lost, by parting with possession.

3. Compensation for salvage, has been made and accepted.

3. Compensation has been made.

4. There has been an *embezzlement* of part of Mr. Gourjon's goods, and Brevoor is responsible. The amount of embezzlement, overbalances any reasonable reward for salvage.

4. Embezzlement.

As to the *jurisdiction* of this court, in cases of salvage on the sea, if it were necessary to determine that point, I should be much disposed to say, it

Brevoor et al. vs. the ship Fair American

Jurisdiction of the district court upon what it is founded.

was *exclusive*. The jurisdiction is founded "*Ob causam aliquam, a re maritima ortum*;" as *Selden* translates the definition of admiralty jurisdiction, given, in French, "pour le fait de la mer." The *place of making a contract*, is not so material as the *place of performance*, in cases even of agreements on land to operate on the sea. See *Zouch*, on the jurisdiction of the admiralty of *England*.[a] The common law courts and some *British* statutes, calculated to favour jurisdiction in the hands of the king, and other lords, have confined this rule, as much as their circumstances would anywise permit. Yet, in 3*d Term Reports*, 267, &c. it is allowed, that admiralty jurisdiction is founded *on the subject matter;* and collateral circumstances, such as *hypothecation* under hand and seal, do not oust it. In the case in which this position is recognized, the judges allow the admiralty jurisdiction, in the case of *hypothecation*, because in the court of admiralty, they proceed *in rem*, and a court of common law cannot. The true point, as stated by *Zouch*, seems to be overlooked by the common law courts, in "the struggles which have been made between the court of admiralty and the common law judges, respecting the extent of their jurisdictions." The jurisdiction does not appear to me to be founded on the mode of proceeding; but on the *original cause*, and *the place*, of the transaction. It attaches "*Ob causam a re maritima ortum.*" Its subjects, according to 3 *Blacks. Com.* 107; are "pure maritime acquisitions, which are earned and become due on the high seas." I cannot conceive a case more

Courts of admiralty proceed *in rem*. Courts of common law do not.

Jurisdiction founded in original Cause, and Place of transaction.

[a] Assertion v, page 52.

Brevoor et al. vs. the ship Fair American.

completely within these descriptions of admiralty jurisdiction, than this now before me. Nor do I see how a common law court could legally take cognizance of such a case, or its incidents. "*La mer a ses lois comme la terre.*"

The jurisdiction of this court, is disputed, because, it is alleged, "The goods were delivered to the owners, by captain Brevoor; and so his lien on them was destroyed; and with it, his claim to salvage. If the claim even continued, it must be by an implied contract, for a *quantum meruit*, arising on the delivery; and this, being on land, must be prosecuted in a common law court. A distinction is taken, between the case of *freight*, and other instances of liens, and that of *salvage*. In the former, if the goods are delivered, the claim continues under the pre-existing contract. But no such contract subsists, in a case of *salvage*. It is allowed, that if the jurisdiction in *salvage* was exclusive, it would preclude all common law interferences. But it is only concurrent; and in proof, a *dictum* of *Lord Holt* is cited, to shew that a plea in a detainer of goods, on account of a lien for salvage, would be admitted. And if a plea can be supported, so may an action."

No case sustained at common law for salvage on the high sea.

No case is produced in a common law court, where a suit there, for salvage on the high seas, was sustained. I have never seen such a case. There does not appear to me, any thing of that mixed nature in this case, which would induce even a legal fiction, to draw the place of this transaction into a common law court. There is no doubt, but that the admiralty had original jurisdiction of the transaction upon which this *salvage* is claimed; and hav-

Brevoor et al. vs. the ship Fair American.

ing this original jurisdiction, it would "have, also, jurisdiction of all consequential questions, though properly determinable at common law."[a]

The "*subject matter*" is an occurrence at sea. A delivery of the articles saved, into a place of safety on land, may be necessary to complete the claim; but does not alter the jurisdiction over the original act. The claim for *salvage*, as a personal demand, is not an unconditional debt, nor in all cases, is a claim for *freight*. In either case, the owners may refuse to take the goods. But if they receive them, the debt is absolute. The acceptance of the goods is a *consummation*, and not an *extinguishment* of the claim. The cause of action here, does not arise from any implied contract, on the delivery. It originates in the saving on the sea; and is pre-existing to the delivery. The right to salvage is not merely inchoate, before any delivery to the owner, but complete. He has the election to take *the thing* or not. If he refuses, *the thing* only is answerable for the reward for salvage. But if he receives the goods, though the lien in the article may be gone, and especially if it passes to a third person, yet the right to salvage continues. It becomes a personal claim, founded on the transaction at sea, and must be prosecuted *in personam*, in the admiralty. In this court, proceedings are as often *in personam*, as *in rem*. Multitudes of precedents could be produced. 3 *Black. Com.* 108, quotes *Clarke's Praxis*, where it is said, "The first process in these courts (admiralty courts) is frequently by arrest of the defendant's person." The admiralty

Admiralty courts proceed as often *in personam* as *in rem*.

[a] 3 Black. Com. 108.

courts, in many cases, possess cumulative powers, beyond those of the common law. The right to proceed *in rem*, does not exclude the remedy *in personam;* though it is taken frequently in preference, for the greater security. In common law courts, as in the admiralty, a party may pursue several remedies; although he can have but one satisfaction. On the instance side of the admiralty, the proceedings are originally (and most commonly) by arrest of the person.[a]

Brevoor et al. vs. the ship Fair American.

Right to proceed *in rem*, does not exclude remedy *in personam*.

Party may pursue several remedies; but can have only one satisfaction.

The case of *hypothecation* is *sui generis*, the persons of the owners are not bound. The debt is contracted, in its original ground, solely on the credit, and with the pledge of the ship; which continues, notwithstanding this lien, in the possession of the owners, or their agent, the master.

If, on the delivery of goods saved, an actual abandonment of claim to reward is made, or satisfaction given to the perfect contentment, or according to a voluntary agreement, of the salvors, no doubt, there would be an end to the demand. But there is no proof in this case, of such circumstances. It appears rather, that the goods were put into the hands of a respectable merchant, in Charleston, to whom captain Brevoor applied "*for assistance;*" (see Dutilh's letter,) they being of a perishable nature, to make the best of them, for all parties. His owner approved of the captain's conduct. But be this as it may, there is no proof of abandonment of claim to, or acquiescence in, satisfaction for salvage.

Bona fide compromise precludes farther demand for salvage.

The underwriters on the ship and goods belonging to Mr. Dutilh, sent the salvors a gratuity of one

[a] 3 Term. Rep. 330.

Brevoor et al. vs. the ship Fair American.

thousand dollars; and *as a gratuity* it was taken. So far from their accepting this sum, whatever might have been intended by the donors, *as compensation*, there is evidence of great dissatisfaction. I join with Messrs. *Hazlehurst & Co.* in their opinion, (see their letter of 1st February, 1799, among the exhibits,) when they inform of the payment of this gratuity.

"Captain Brevoor is amazingly chagrined at the sum given by the underwriters, and we think he well may be, for it is certainly a small amount for so great an undertaking as that of three men, retaking a valuable and fine property, from nine French privateersmen."

Underwriters not parties in this case.

I consider the underwriters as strangers in this cause; though they are involved in a statement of facts and circumstances. The libellants have no remedy against, or claim on, them. They do not act as agents or trustees for the owners; but in their own right, by a transfer, under the abandonment of the property. There was not even a gratuity given by those persons, on Mr. Gourjon's goods. I apply the evidence, under the commission taken out by him, only to his case.

In the deposition of *Florian C. May*, he says (answer to the 4th interrogatory), "I never heard the libellants mention they were satisfied with the reward offered and sent to them. On the contrary, I know they were dissatisfied, and that the men proposed to libel the ship. But, on the captain consulting me, I advised him to defer any legal measures, 'till his return to *Philadelphia*, when, I was assured, that the owners, and the underwriters, would do him, and the men, ample justice, for their

gallant conduct, in recapturing the *Fair American*, and bringing her into port. And he acquiesced willingly in the advice, reserving the right to make, and support, the claim of salvage, or to some adequate compensation, on his return to Philadelphia."

Brevoor et al. vs. the ship Fair American.

Here is a full proof (as to Mr. Gourjon's goods), of dissatisfaction; and an intention to pursue the claim. So far was Mr. Gourjon from considering the gratuity, which had been accepted, as a matter of any concern to him, or his underwriters, that an offer was made to captain Brevoor, after his arrival at Philadelphia, of compensation for salvage. It was deemed inadequate, and refused. This offer was made on behalf of the underwriters, on Mr. Gourjon's goods.

I shall close my observations, and opinion, upon this part of the subject, with remarking, as it relates to the powers and jurisdiction of the court, that, I think, there is more weight in the allegation of the libellant's counsel, that in this case, there is an ingredient in which a *question of prize* is involved, than the respondent's counsel are inclined to allow. *Salvage* may arise from a recapture from *pirates*, but it is here agreed, that the recapture was from those who took, *as prize*, the ship and goods; and acted under a commission, or authority, from a power, considered on the ocean as an enemy.

The point made, as to Brevoor's possessing the ship, not as salvor, but as captain under Dutilh, who then held by a new title, is rendered immaterial, if my opinion respecting the delivery of the goods, is well founded. We find the ship, however, in the hands of the same persons, who had the right to both property and possession, in most of the

Brevoor et al. vs. the ship Fair American.

stages of this transaction. The proceeding *in rem*, as to the ship, is therefore substantially proper.

The fact of *embezzlement*, so as to apply it to any of the salvors, is not made out.—Part of Mr. Gourjon's goods did not appear at Charleston. No salvage can be allowed, farther than on the amount of goods sold and delivered. Whether the deficiency was occasioned by plunder on the capture, against which supposition there is some negative testimony, or by embezzlement, at Charleston, does not appear. An opinion of a witness states the probability of its having happened at Charleston, and suspicions, without proof, are aimed at one of the *salvors*. The *French* prisoners were on board, at Charleston, a considerable time before the Marshal took charge of them. No doubt others, than either captain *Brevoor*, or his men, or the prisoners, had, necessarily, access to the ship; which lay, for a length of time, without orders for her final destination. So that the matter is left in doubt and uncertainty. The captain is not answerable for plunder on capture, or as a recaptor, for losses, arising from the malfeazance of others.* His quality and responsibility, after

Salvage can only be allowed on the goods actually delivered.

Quality of the master is changed by capture; and, on *rescue*, he acts in a new capacity.

* It has been frequently determined, in this court, that *during the period of detention*, either by captors, as *prize*, or belligerents, in amity, for *adjudication*, all the responsibilities of the officers and crew are suspended. But proof has been admitted, to shew either distinct acts of plunder, or embezzlement, by the crew, individually or in collusion with the possessors of the ship. The general principal of contribution, *by all*, has not been allowed, during the forcible detainer; but the frauds and malfeazance *of individuals*, have been permitted to be *sett off*, *against their respective claims*.

the capture and recapture, were entirely changed. He is amenable for any misconduct of his own, but nothing of this kind is alleged. On the contrary, his character, for integrity, care, and attention, stands very high, and is in proof, in the testimony of Mr. May. Fraud and embezzlement must be clearly proved, and fixed on a party, before I can make him answerable. Nor can the captain be called on now for contribution, as he could have been in his former capacity, when, as master of the ship, he was answerable for the embezzlements of his crew. In that case, the fact, as to the crew, would require more pointed proof, than appears in this cause.

Brevoor et al. vs. the ship Fair American.

There was an allowance claimed for freight, by Mr. Dutilh's, or Mr. Gourjon's, counsel, but it must be clearly seen, that the freight was lost by the capture: this is, therefore out of the question. If there is any loss of freight, or other misfortune, on account of the failure of the voyage, it is not chargeable to the recaptors. Reimbursement must be sought elsewhere. It is charged, in one of the exhibits, to the underwriters. Had it been saved to the owners, I should have allowed salvage on it, but as it was lost, I have no decision to give on the subject.

Freight lost by capture, and voyage destroyed.

It only relates to the equity of this case, to state, that the respondents have amply covered the amount of all losses on this ship, and cargo.—If they had

In the case of the Blaireau, 2 Cranch. Rep. 240, a claim of salvage, by the master, who had been guily of embezzlement, was dismissed.—*E.*

Brevoor et al. vs. the ship Fair American.

not, I should deem the claim equally legal and relevant.

Mr. *Dutilh's* ship, sold at Charleston, for five thousand and fifty dollars, $ 5050

His part of the cargo, for seven thousand and fifty-one dollars, - - 7051

Mr. *Gourjon's* (I take this sum, as there is some dispute about the difference between this, and 6770 dollars, per M. C. May's account), six thousand four hundred and eleven dollars, and ninety cents, - - - - 6411 90

$ 18512 90

Total, eighteen thousand five hundred and twelve dollars, and ninety cents.

I do therefore adjudge, order, and decree, that the recaptors have, and recover, in full satisfaction for their salvage, the sum of four thousand six hundred and twenty-eight dollars, and twenty-two cents, to be apportioned amongst them as follows,*

Amount of *salvage.*

* See (interalia). The cases of the *Aquila*, 1 Robinson's Adm. Cases, 32, &c. Phil. ed. and that of the *Two Friends*, same, 228, determined in 1798, (but not seen here, at the time of this, and some other decisions, in salvage cases,) in which there is a coincidence of opinion, upon the great points. As to the definition of *derelict*, there given from Sir Leotine Jenkyns, it creates no material difference. It means *deserted;* and not a voluntary abandonment, or *derelict*, entitling the occupant to the whole. The owner is entitled to the surplus, on paying *salvage*. If no owner to be found, after a time generally fixed, or at discretion thought reasonable, the vessel, or goods, found at sea deserted (on paying salvage), becomes a national *droit;* distributable,

SALVAGE—RESCUE.

Brevoor et al. vs. the ship Fair American.

Distribution.

The ship, charged with twelve hundred and sixty-two dollars, fifty cents; out of which, one thousand dollars to be deducted.

Mr. *Dutilh's* goods, seventeen hundred and sixty-two dollars, and seventy-five cents, - - - - - $ 1762 75

Mr. *Gourjon's* goods, sixteen hundred and two dollars, and ninety-seven cents, 1602 97

Balance of ship, two hundred and sixty-two dollars, and fifty cents, - 262 50

$ 3628 22

Which sum of three thousand six hundred and twenty-eight dollars, and twenty-two cents, is to be divided as follows, among the recaptors.

To captain *Brevoor*, (balance of ship,) one hundred and fifty-seven dollars, and fifty cents, - - - $ 157 50

To *John Schier*, (seaman) fifty-two dollars, and fifty cents, - - - - - 52 50

To *Anthony Fachtman*, (cook) fifty-two dollars, and fifty cents, - - 52 50

$ 262 50

To capt. *Brevoor*, (Dutilh's goods,) one thousand and fifty-seven dollars, and sixty-five cents, - - 1057 65

or devolving, in the whole, to the prince, lord high admiral, or otherwise, according to the peculiar political arrangement of the government of the country, into which they are brought.

SALVAGE—RESCUE.

Brevoor et al. vs. the ship Fair American.

To *John Schier*, three hundred and fifty-two dolls. and fifty-five cents, -	352 55		
To *Anthony Fachtman*, three hundred and fifty-two dollars, and fifty-five cents,	352 55		
		1762	75
To capt. *Brevoor*, (Gourjon's goods) nine hundred and sixty-one dollars, and seventy-nine cents, -	961 79		
To *John Schier*, three three hundred and twenty dollars, and fifty-nine cents,	320 59		
To *Anthony Fachtman*, three hundred and twenty dollars, and fifty-nine cents,	320 59		
		1602	97
		$ 3628	22

So that captain *Brevoor* is to receive, in the whole, two thousand one hundred and seventy-six dollars, and ninety-four cents, $ 2176 94

John Schier, seven hundred and twenty-five dollars, and sixty-four cents, 725 64

Anthony Fachtman, seven hundred and twenty-five dollars, and sixty-four cents, 725 64.

$ 3628 22

And I do further adjudge, order, and decree, that the said ship *Fair American*, with her tackle,

apparel, and furniture, (or so much thereof as may be necessary) be condemned, and that the same be sold by the marshal of this district, for the payment of the several recaptors aforesaid, of their respective proportions of the said two hundred and sixty-two dollars, fifty cents, the sum charged upon the ship. And I finally adjudge, order, and decree, that the respondents, *Stephen Dutilh*, and *John Gourjon*, pay to the said recaptors, the several sums of money, above charged upon the goods of them, the said *Stephen Dutilh*, and *John Gourjon*, respectively: all which are to be brought into court, to be distributed agreeably to this decree.—The costs and charges to be paid by the respondents, in proportion to their respective interests.

Brevoor et al. vs. the ship Fair American.

SEAMEN'S WAGES.

Thompson, Jacobson, and others,
versus,
The ship Catharina,

COURT.

1795.

Laws and principles which govern the maritime courts of the U. States.

THIS was the case of a foreign ship, which came before the court on a claim for wages by her seamen, who by their contracts had engaged to return to the port from which they shipped. During the progress of the cause, the following opinion was given by the district judge.

"An objection is made, though not very seriously pressed, to my decision on a point, on which our own municipal laws are silent. This objection, however, obliges me to give my sentiments on the question "*What laws or rules shall direct or govern the decisions of maritime courts here, in points on which we have no regulations established by our own national legislature?*"

There are, in most nations concerned in commerce, municipal and local laws relative to contracts with mariners, and other maritime covenants and agreements; though the great leading principles, or outlines, are in all nearly the same. On this account among others, I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen, are concerned. I have in general, left them to settle their differences before their own tribunals. On several occasions, I have seen it part of the contract, that the mariners should

Thompson et al. vs. the ship Catharina.

not sue in any other than their own courts;—and I consider such a contract lawful. It would be against law, and void, if it were, that the mariner should *not sue in any case;* or, that he should *not sue in the proper court, or courts of his country.* But where the voyage of a foreign ship ended here, or was broken up, and no treaty or compact designated the mode of proceeding, I have permitted suits to be prosecuted. In such cases, I have determined according to the laws of the country to which the ship belonged, if there existed any peculiar variance or difference from those generally prevailing. I have seldom found any very material difference in principle. The laws and customs of Spain,* relating to mariners, are more rigid than those of other nations, on similar points. Among other points of variance from other laws, those of Spain grant the master, a lien on the ship, for

* *Spain* cannot be said to have a general national code. She possesses a number of local collections and ordinances, operating in different maritime districts of that extensive kingdom.

1. Their civil law, consists of a great number of particular laws compiled in the form of *codes.*

2. Each has particular titles. See Azuni, M. L. vol. i, p. 404, 405.

3. The *Consolato del Mare*, is an adopted code, and governs in the Spanish courts of the *Mediterranean.*

4. The laws and ordinances of the *Consulate of Bilboa*, prevail on the *Spanish* coasts of the *Atlantic.*

5. The commerce of the *Indies* is regulated by a particular *code*, distinct from others. It is governed by, and subject to, the usages of the *Contractacion*, or *Consulate* of *Seville.* See Azuni. of whom, in addition to many more antient writers, I have made much use on those subjects.

Thompson et al. vs. the ship Catharina.

his wages. In the present case, the contract was in part, with mariners of the United States; and these seamen were to be discharged in an *American port.* I apply the authority of this court to the case of our own citizens. If by our own municipal laws, there are rules established, our courts are bound exclusively to follow them. But in cases where no such rules are instituted, we must resort to the regulations of other maritime countries, which have stood the test of time and experience, to direct our judgments, as rules of decision. We ought not to betray so much vanity, as to take it for granted, that we could establish more salutary and useful regulations than those which have, for ages, governed the most commercial and powerful nations, and led them to wealth and greatness.

Laws of the *Rhodians* adopted by the *Romans.*

The laws of the *Rhodians* were followed and adopted by the Romans, in their most prosperous state of commerce aud power. Those in the celebrated *Consolato del mare,** prevailing in the *Medi-*

* *Il Consolato del Mare.* These are the most ancient, celebrated and authentic *sea laws*, after those of the *Rhodians*, *Greeks*, and *Romans*. Yet *Hubner*, because he found (as *Emerigon* alleges), a passage in them contradictory to a favorite dogma, vituperates and depretiates them, to his own disgrace, and not to their disparagement. As a respectable part of the laws of nations, they have always been received in the *English* courts of admiralty, and those of this country. Their origin is enveloped in obscurity, though attributed to several nations, as well as to the *Pisans*, to whom a modern author labours to ascribe them. Their influence, value and authority, have been appreciated by claims to their origin, set up by various people of maritime countries. Those laws have prevailed in the countries occupying the coasts of the *Mediterranean*, and in the neighbouring parts of

Thompson et al. vs. the ship Catharina.

terranean, and established, in concert with other trading states and countries, by the *Venetians* and *Genoese*, in the periods of their naval power and commercial prosperity, are collections of, and improvements on, more ancient customs and laws. Of these, the *Amalfitan code* (the first and most respected of what are called, as they relate in point of time to those of the *Rhodians* and *Romans*, "*modern sea laws*,") furnished the predominant and most generally received principles.* The laws of *Oleron*,

Amalfitan code.

Laws of *Oleron*.

southern *Europe*, for centuries. Although some special and local laws exist, in several national districts of that region, yet the *Consolato del Mare* is, to this day, the leading directrix, in their maritime jurisprudence, and naval affairs.

This body of maritime law is *a compilation* "of the best maritime laws then existing, comprising judicial proceedings, principles and decisions, settled by men of great experience and consummate prudence; who, having reason and custom for their guides, established these excellent regulations, concerning navigation and maritime contracts." It may, indeed, be called the *common law of maritime Europe*, where it is universally adopted and respected.

* The city of *Amalfi* was situate in, what is now called, the province of *Salerno*, in the kingdom of *Naples*. Nothing great remains of it, but its celebrity for the most extensive commerce of its time, its immense wealth and magnificence, and its great weight in all questions of maritime concern. Like the *Rhodians*, the *Amalfitans* furnished principles for the codes of other maritime countries of southern *Europe*. These remain engrafted into the laws of other nations; though the *Amalfitan* code, or, as it is sometimes called, "*Table*," is not preserved. To the *Amalfitans*, the invention of the mariner's compass, is ascribed. Dr. *Robertson* gives the discovery to a native of *Amalphi*. But no opinion about ancient transactions, seems to be at rest. *Azuni* says, the *French* invented—the *Amalfitans* improved—and the *Portuguese* perfected, this *compass*, in their discoveries

Thompson et al. vs. the ship Catharina.

occupy now a portion of the famous *Black book of the British admiralty*, which is consulted by all their courts on subjects of maritime and commercial controversy. These laws of Oleron were not entirely of British growth. They were compiled at first, as French authors assert, and from the face of them it would seem probable, by Queen Eleonora, Dutchess of Guienne, for her continental dominions, and afterwards improved and enlarged by her son Richard the First, of England, in no small degree from the maritime laws and customs, not only of his own country, but also from the laws and customs prevailing among the continental trading nations. Of these, the Saxons were, at an early period, the most conspicuous and practically intelligent in nautical affairs. They introduced into England their maritime knowledge, as they did some valuable principles of the common law. What was entitled, the Saxon shore, extended from the western parts of Denmark, to the western parts of France. The excellence and importance of these laws of Oleron, are evinced by a contest for their origin between two great nations, who have wisdom and liberality enough to follow them, be the fact of origin how it may. The maritime ordinances of *France* (where also the laws of Oleron, or Roll d'Oleron, are in force, and claimed, as of French origin) are very

Maritime ordinances of *France*.

of the New World. The *Chinese*, forestal the whole, in the antiquity of their claims, to this most eminent of all useful inventions. The *Pisans* and the *Amalfitans* share the credit of the discovery and preservation of the *Pandects* of Justinian, after their having been long buried in obscurity, during the barbarous ages.

Thompson et al. vs. the ship Catharina.

much grounded on the sea laws of other nations, mixed with their own. Those of *Louis the Fourteenth*, were compiled under the direction of the great minister *Colbert*, from such materials, with local additions, suited to that country. The laws of the *Hanse Towns*,* are nearly in substance the same with those called the laws of *Wisbuy*, and both are principally founded on those of Oleron. The sea laws of *Spain* are, in no small degree, collections from those of other nations. There is a striking similarity in the leading principles of all these laws. So far from sound principles becoming obsolete, or injured by time, that it will be found, on careful investigation, that the oldest sea laws we know, those of the Rhodians †, have furnished

Laws of *Louis XIV.*

Laws of the *Hanse Towns*, and of *Wisbuy*.

Sea laws of *Spain*.

* The laws of the *Hanse Towns* were published first in 1591, and reviewed in 1614, and posterior to those of *Wisbuy* or *Oleron*. The history of this commercial confederacy is well known. Although in itself and its dependencies, it consisted of 62 cities, originally, it is now reduced to six, consisting of *Lubeck*, *Hamburgh*, *Dantzig*, *Bremen*, *Rostock*, and *Cologne*. Its existence to this day, in any state of respectable combination, is a singular instance of survivorship over the ravages of time, the jealousies of powerful nations, and the exposure to interior danger and dissension; to which all multitudinous associations, whether national or individual, are constantly, often fatally, liable.

† In a note to the case of *Walton and others, vs. the Neptune*, it will appear, that *Azuni*, in his book on Maritime Law collects all the authorities for and against the authenticity of the fragments of *Rhodian Laws*, published by *Simon Scardius* and others, and continued to our time, in collections of *Sea Laws* as genuine. *Azuni* declares them spurious. But although, according to him, these may not be genuine, as to the text and *very words* (which other respectable writers either impliedly or positively assert they are) they contain many of the principles we see in other

Thompson et al. vs. the ship Catharina.

the outline and leading character of the whole. With such examples before us, we need not hesitate to be guided by the rules and principles, established in the maritime laws of other countries. As the ocean is common, it is proper and essentially convenient, that its laws should be also common to all who travel this "*high road of nations.*"

I shall not contend with those who say, we ought to have a maritime code of our own, about the binding force of all these laws on us. By the general laws of nations we certainly are bound. These apply, most frequently, in the prize court; but there are many cases of *salvage*, *wreck*, &c. on the *In-*

codes and works. *Azuni* allows, agreeably to a cloud of authorities he could not controvert, that "the *Rhodian laws*, whatever may be the period of their publication, are the *fountain of maritime jurisprudence*" Azuni. M. L. vol. i, 277. N. York edition 1806.

The *Rhodians* applied themselves exclusively to commerce, and avoided every idea of extension of territory. Their fleet was so powerful, and their naval regulations so excellent, that they were courted by the most mighty nations of their time. They held the empire of the sea, and by confining their strength and resources to maritime objects, they not only protected and extended their own commerce, but scoured the ocean of pirates who annoyed the trade of all countries. *Alexander the Great* treated them with marked distinction. The *Romans* were their admirers, allies and friends. These powerful Islanders entitled themselves to the friendship and esteem of other commercial nations, by aiding and protecting, and not by restraining similar pursuits. Their superiority, in mercantile and naval talent and enterprise, gained them the admiration and respect of their contemporaries; when a spirit of monopoly, jealousy and plunder, would have handed them down to us, not to be imitated, but detested.

Thompson et al. vs. the ship Catharina.

stance or civil side of the court, which, necessarily must be determined under the general law. The wisdom and experience, evidenced in the particular maritime institutions of other commercial countries, ought at least to be greatly respected. If they serve only as faithful guides, and tried and long established rules of decision, in similar cases, they are of high and exemplary importance. It must be granted, that it is safer to follow them, than to trust entirely to the varying and *crooked line* of discretion.*

* The foregoing enumeration of some of the *maritime codes*, is not intended to comprehend the *whole*, which would swell the account too extensively. It is given merely to shew, that the most renowned maritime nations always adopted the principles, when long tried and tested, of their predecessors, or contemporaries. *England* has not collected into a body, or code, the maritime laws by which she deems herself bound peculiarly, though she has enacted some laws, in addition to the laws or judgments of *Oleron*; such as the statute *De Mercatoribus*, the articles of *Quinsborough*, the acts relative to the powers of the admiralty, her navigation act, prize acts, &c. Her *law merchant*, and that part of it relating to *assurances* particularly, as well as *maritime law*, are chiefly collected in the decisions of her courts. These are founded on usages and established customs, as well of her own, as of all countries possessing respectable codes or principles of maritime law. When they are duly canvassed, and have stood the test of time and sound discussion, they become part of their common law, and settled as precedents of indisputable authority. In their courts, respectable foreign jurists and publicists are cited, and their reasonings opinions and statements regarded, in the decision of maritime questions. Such has also been the practice in the courts, particularly of maritime jurisdiction, of our country. *Holland*, though its existence depended on commerce, has never had any peculiar national code of maritime laws.—Possibly owing to the division of her territory into separate provinces.

Thompson et al. vs. the ship Catharina.

Where a reciprocity of decision, in certain cases, is necessary, the court of one country is often guided by the customs, laws, and decisions of the tribunals of another, in similar cases.

But the change in the form of our government has not abrogated all the laws customs and principles of jurisprudence, we inherited from our ancestors; and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the *Common law*,* in all cases, consistent with the change of our government, and the principles on which it is founded. They possess, in like manner, the *Maritime law*, which is part of the *Common law*, existing at the same period; and this is peculiarly within the cognizance of courts, invested with *maritime* jurisdiction; although it is referred to, *in all our courts*

We have the Common law in the United States.

* The *feudal parts* of this law, and such as are inconsistent with the principles of our government are not, nor can they be, in force. Those who are best acquainted with its wise and just principles, as they relate to contracts, and the property, as well as the personal rights of individuals, admire the *Common law* as the venerable and solid bulwark of both liberty and property. *Statute laws* innovating upon it, have seldom been found, on experience, to be real improvements. Those who do not know the Common law suppose it to be every thing, *that it is not*. Its rules and principles are not arbitrary, but *fixed* and *settled* by the wisdom and decisions of the most respectable and intelligent sages, of both ancient and modern times. Many of the objections raised against it shew a want of acquaintance with its system and principles. Some of these objections are founded in innovation *made by statutes* altering or obscuring, the Common law. Others have nothing in either common or statue law to support them.

on *maritime* questions. It is, then, not to be disputed, on sound principles, that this court must be governed in its decisions, by the *maritime code* we possessed at the period before stated; as well as by the particulur laws since established by our own government, or which may hereafter be enacted. These laws and the decisions under them, must be received as authorities, in this, and other courts of our country "*in all cases of admiralty and maritime jurisdiction*," to which, by the constitution, it is declared "*the judicial power of the United States shall extend.*" Nor shall I think myself warranted to exclude more modern expositions, or adjudged cases from being produced here. Whatever may, in strictness, be thought of their *binding* authority, I shall always be ready to hear the opinions of the learned and wise jurisprudents or judicial characters of any country. On subjects agitated in this court, often deeply affecting the property and reputation of the suitors, I am not so confident in my own judgment, as not to wish for all the lights and information, it may be in my power to obtain, from any respectable sources.

Thompson et al. vs. the ship Catharina.

This court must be governed by the maritime code we possessed before the revolution, where not altered by law or by a change of circumstances.

If, in any instance, the laws or the decisions under them, shall be found or deemed severe, or not suited to a particular exigency or course of trade, parties may mould their contracts at their will, according to circumstances, by mutual agreement and consent. Let the law be what it may, *Modus et conventio vincunt legem*, in all contracts, not radically against common justice, moral and political obligation, and those principles which the law will not suffer to be destroyed or perverted for private pur-

Parties may mould their contracts at their pleasure, in cases not against common justice.

Thompson et al. vs. the ship Catharina.

poses.* If under a contract, by a casualty, a particular inconvenience arises from the general principles of the maritime law, the party must submit. He must consider what he loses or pays as a contribution to the great and general interests of commerce, or the predominant policy and advantage of his country.†

* The conditions of bonds, or considerations of promises, or agreements in contracts accounted illegal and void, are numerous and well known to lawyers. A contract cannot be legally binding which defeats its own object—such as that no suit shall be brought at all for a *bona fide* debt, agreed to be paid—a condition in a deed to do an act *malum in se*, as to beat, or kill a man, or commit any crime—Insurance on an illegal voyage—Bonds for general restraint of trade are void, though good where the condition is not to carry it on in any particular place—A bond to a third person that the obligor, a witness, shall not prosecute one confined for felony, perjury, &c. and many other instances which might be given.

A bond with impossible conditions is absolute, and the condition a nullity. An agreement or contract not to bring a suit to enforce performance is, if made at the time, well. But if made posterior to the bond, contract or agreement, it amounts to a general release.

† The cause, in which the foregoing opinion was delivered, was of a mixed character. Part of the complainants were foreigners; and bound to return home with the ship. Although with a view to sail out of our port, at our high wages, they endeavoured on pretext of deviation, to obtain their discharge; the cause was dismissed as to them—they were referred to their own courts for decision. Wages were decreed to two *American* seamen, who were by contract to be discharged here.

In the case of *Willendson vs.* the *Försöket*, *post*, the principles adopted by the court, relative to foreign seamen are further elucidated and explained.

SEAMEN'S WAGES.

Joseph Hart, a mariner,
versus
The ship Littlejohn.

DECREE.

1800.

JOSEPH HART, in July, one thousand seven hundred and ninety-nine, shipped, as a mariner, on board of the American ship *Littlejohn*, at *Edenton*, in North Carolina, on a voyage from thence, to *Liverpool*, in England, and back to *Edenton*. The ship went to Liverpool, and delivered her cargo. On her return, she was captured, by a French cruizer, in the possession of which she remained about eight days. She was recaptured, by an English frigate, and carried into Lisbon; where she was restored, on payment of salvage, and arrived, from Lisbon, at Philadelphia, where the mariners, who came in her, were discharged. The libellant was taken on board the French cruizer, and carried into France, a prisoner. Being there released, he worked his passage home.

An American ship delivered her cargo at Liverpool; and on her return to the United States, was captured by a French cruizer, recaptured by an English frigate, and restored, on payment of salvage. The libellant, a mariner, having been taken on board the French cruizer, was carried into France, and there released —Wages for the whole voyage of the Littlejohn claimed, and allowed, deducting a proportion of salvage.

The queston made, in this cause, is, "Whether this mariner, who was forcibly taken from the ship, in which he was engaged for the voyage, shall be paid, pro rata, to the time of capture, or shall have his full wages for the voyage?"

Without entering into the facts, as to the voyage being ended at Philadelphia, or not; the cause was put on the question stated—to it, therefore, I shall confine myself.

SEAMEN'S WAGES.

Joseph Hart *vs.* the ship Littlejohn.

Seamen, under like circumstances, allowed wages in many instances.

I have, heretofore, in many instances, decreed, that seamen, under like circumstances, with the libellant, should be paid their full wages for the voyage. I have always supposed, that if the ship, owing to the absence of one, or, more mariners, thus forcibly taken away, was at the expense of hiring others, this extra expense was chargeable as an average loss;* or, in an account, for spoliations on our neutral commerce, if the capture was made by the subjects of a power in amity with us, and was finally adjuged unlawful; yet, having only the right to determine the question of wages, I have not given my opinion, as to consequences, or entered into collateral enquiries.†

I had grounded my opinion, in cases like the present, and those of sailors falling sick, during the voyage, on the authorities cited by the libellant's

* If it can be charged at all, *as average*, it must be as what is called *petty average;* as a disbursement, the master was bound, necessarily, to furnish, for the benefit and safety of both ship, and cargo.

† This case was determined, at a time, when arrests of our ships, by others than the French, were, for the purpose of adjudication, for breaches of neutrality. And when in Europe, *some attention* was paid to the laws of nations, and special conventions, and by the courts of the belligerents, the payment of salvage, was decreed by the British courts; and submitted to under no positive regulation. It was said, by them, to be an affair of *comity*, in treating our ships on the same footing with those of their own nation. The fact is, that no *salvage* is due, *in common cases*, where neutrals were taken out of the possession of a belligerent, and *bona fide* carrying in, for examination, by a competent and impartial tribunal. But between the French, and the United States, there then existed partial hostility. See a note to the case of Clayton et al. *vs.* the Harmony, ante page 78.

Joseph Hart vs. the ship Littlejohn.

counsel, and some others.[a] These authorities, or several of them shew, among other things, that if a mariner is sent out of the ship, on a special service, and is taken, and made a slave, falls sick, &c. his ransom, cure, and expenses, are to be paid by the master, or owner, as well as his full wages for the voyage. It is certain, that those authorities which mention the case of a special mission, are most clear, on the point of ransom; though it is often said, in addition, "that the ransom shall be paid, without prejudice to wages." There is also, in Valin. vol. i, 748, a distinction taken, between the case of one *sent from the ship*, and that of one *taken in the ship*, with the rest of the crew.* In this latter case, the ransom of no one is to be paid. If the vessel is made prize, and lost to the owners, no

[a] Vide Consolato del Mare. c. 179, § 202. Sea Laws, 130, 7th art. of the Laws of Oleron, and note, p. 140. Emerigon, vol. i, p. 635, 637, 638. Valin's Ord. of France, vol. i. p. 748, 75. Pothier Louagé de Matelots. Laws of Wisby, art. 45, 203.

* Where any peculiar benefits are appropriated to one sent on a special mission, they are allowed, to induce and reward the risks and sufferings, by casualties, to which those *in the ship* are not exposed, the undertaking being most commonly voluntary, and not any part of the terms of the general contract. It differs from the case of one *forcibly taken out of the ship*, who participates in the fate of the ship; and receives, or not, his wages, according to circumstances operating *on freight*. One *taken by force out of the ship* may, in some instances, be individually wronged; and separated from his contract, by a lawless and unjustifiable act of violence, merely personal as to him, and not part of the transaction by which the whole crew are affected. No general position can be formed, to embrace every occurrence.

Joseph Hart vs. the ship Littlejohn.

doubt, neither ransom or wages can legally, or justly be claimed. There is a special obligation, however, on the owner or master, to indemnify a sailor, sent on extra duty, and exposed thereby to uncommon risk. But in these authorities, whenever wages are mentioned, they are not designated as due, merely on account of the misfortune occurring on the particular exigency, but on the general principle—"because he (the mariner), is not in fault;" and it is added, "the defect of service is no more to be imputed to him, than if he had fallen sick on the voyage, in which case, his wages are due without deduction." Val. vol. i, p. 748.* Thus, placing his capture, even on special service, as it respects wages, on the same footing with his falling sick on the voyage. Now it is clear, that in case of sickness preventing a performance of duty, if the malady be not occasioned by the mariner's mal-conduct, the full wages are payable, whatever expense, or loss, the ship may incur, on this account; and I see no reasonable distinction between this case and that. If a sailor dies on the voyage,

* *Commentaries on the laws and ordinances of France.* It is difficult to determine which most to admire, the *laws* of Louis the fourteenth, on which these *commentaries* were written, or the talents, acuteness, learning, and judicious observation of the commentator. From these highly celebrated laws, and their masterly commentator, the knowledge of maritime contracts, assurances, and other branches of this subject, displayed on the British bench, by some of their most eminent judges, is said to have been acquired. This may, or may not, have originated in partiality for the laws, and the country of their origin. But neither the laws, or their commentator, required this additional testimony. They bear within themselves their own eulogy.

his heirs shall have his full wages. If killed in battle, they shall also have a share of all prizes.[a]

Joseph Hart vs. the ship Littlejohn.

Sailor dying on the voyage his heirs shall have full wages. If killed in battle, heirs shall have a share of all prizes, taken during the cruize.

If it were relevant to this point for me to shew, that the loss should be charged as an average loss, I might cite, from the 3d edition of Malyne's Lex. Mercat. page 62, of his "Collection of all Sea Laws," the 18th chapter, where it is declared, that when goods are taken by a pirate out of a ship, though not as contribution for the rest, yet the loss shall be common to all concerned.* The chance of the seaman carried off, while others are permitted to remain, should not be worse than that of the owner of the particular goods, taken at the pleasure of the pirate.[b] But I do not much rely on this analogy, or authority; my opinion is founded on the general principle—"That, where a mariner is prevented by force, when he is not in fault, from performing his voyage, he is to be paid his full wages."[c]

[a] See Valin. Emerigon, 633, 637, 638. Laws Oleron, art. 7. 1 Espinasse, 114.

[b] Malyne's Lex Marc, 109.

[c] Consulato del Mare.

* In some of the books (Molloy. 249,) a distinction is taken where goods are taken by pirates to spare the rest, this being beneficial *to all*, contribution must be paid *by all*. But where part are taken by violence, under no agreement to spare the rest, but as an independent spoliation, the residue is not subject to average. It is on this principle, to be found in other cases, that I have considered *a seaman taken by force* (not as part of the transaction in which a ship, and her crew, were generally involved,) when others of the crew were suffered to proceed on the voyage with the ship, to be individually wronged, and not entitled to wages for the voyage.

Joseph Hart *vs.* the ship Littlejohn.

But if, during the time the voyage continues, he earns wages in other service, these shall be deducted from his claim. I have uniformly, in such instances, ordered this to be done.

The general principle which has influenced my judgment, is established in the Curia Philippica, 472, 36, where it is laid down, that "if a master of a ship discharge a mariner, before the end of the voyage; or if, by a fortuitous circumstance, he ceases to serve, yet he shall have his wages, for the time past, as well as for that to come." But all wages, earned during the time he was in another service, are to be deducted. In the Roman Digest, page 514, 515, the like general principle is established, in the cases of servants, an amanuensis, and in that of an advocate, who is not obliged to return his fee, if it was not his fault that he did not try a cause.[a]

General principle of *entire* contracts.

It is true, that this general principle cannot be carried into all cases. In the *British* law books, we find it held by respectable judges, "that a seaman impressed, or one of the crew of a ship ransomed, shall only be paid pro rata." But the impressment of seamen, is deemed, in *England*, a lawful act, and encouraged by the policy of that country; and the seaman receives, on his change of employment, what by their laws, are established as competent wages. The ransom of ships captured, is the purchase of the property from the enemy, after it is lost, and the ransomers hold it, in some measure by a new title. *Capture*, involves the loss of wages. The *ransom* of ships is not encouraged by the *British* government, but their laws

British cases, as to impressment, ransom, &c. do not apply.

[a] See also Godolphin's Adm. Laws, p. 177, 178, note and text.

particularly favour recaptures, and in such cases, extend the *jus postliminii* farther, than those of most other nations. Whatever the opinion of Common law judges may be, I am bound to follow the rules of the civil and maritime law.

Joseph Hart vs. the ship Littlejohn.

When the ship and cargo are restored, on recapture, and payment of salvage, the owner recovers his freight; and this is the parent of wages. It is only where freight is recovered, that I have applied this general principle, to the claims of seamen. They contribute, out of their wages, their proportion of salvage.

When *freight* is recovered wages re-attach. But seamen must contribute proportions of salvage on recapture.

That no adjudged case be found in the books, exactly like this under consideration, is, perhaps, true. It may never have been disputed. But, as such cases frequently occur, this point is of considerable importance, both to our merchants, and mariners. I do not wish it to rest on my judgment alone. Whenever the sum claimed, is sufficient, in amount,* to warrant an appeal, I shall recommend the cause to be carried up to a superior court. In the mean time, I cannot see any good cause to alter my opinion, and I therefore, adhere to the principles of my former decisions:

And do adjudge, order, and decree, that the said Joseph Hart, have, and recover, in full satisfaction of his wages, the sum of one hundred and fifty-three dollars, and eighty-three cents, being the

Full wages; deducting all sums received and a proportion of salvage, allowed.

* When this decision was given, no appeal was permitted in cases where the amount claimed did not exceed three hundred dollars, but a late act of congress, allows appeals from the district, to the circuit, court, in all cases where the sum in dispute exceeds fifty dollars.—*E.*

Joseph Hart
vs.
the ship
Littlejohn.

balance of his full wages for the voyage. Out of this sum, are to be deducted any sums, received by him, and also his proportion of salvage, paid on the restoration of the ship, and cargo. And I do further adjudge, order, and decree, that the said ship Littlejohn, together with her tackle, apparel, and furniture, or so much thereof, as may be necessary, be condemned and sold, for the payment of the sum of money, herein before decreed, to the said Joseph Hart, and of the costs and charges, accruing in the premises.

SEAMEN'S WAGES.

Howland, a mariner,
versus,
The brig Lavinia.

1801.

A Seaman carried off, vessel taken and re-taken, paid salvage, and earned freight—Wages for the voyage claimed and allowed.

JOHN HOWLAND was forcibly taken out of the vessel, and carried off by the capturing privateer. The brig was retaken, paid salvage, and returned to Philadelphia, having earned her freight. Wages were claimed for voyage, deducting a proportion of salvage.

Court.—I have so often determined this point, that it is needless to enter into any further discussion of it. It must be settled on appeal by a superior court, if parties are dissatisfied with my opinion.*

* Since the points here determined, I have continued to decide whenever they have occurred, on the same principles. In the case of the "*Friends, Bell, master*," (Dec. 11th, 1801.).[a] *Sir W. Scott* determined in the case of a belligerent British seaman, that the capture extinguished the contract, which the recapture did not revive. But I conceive the situation of a *neutral seaman*, one of the crew *of a neutral ship*, carrying in for *adjudication*, and *taken away from his ship by the Vis Major*, is not similar to the case of the sailor as determined by *Sir W. Scott*; and so I continue to decide, respectable as his opinion most assuredly is. The neutral seaman was not captured and carried off *as a subject liable to the hazards of war*, but as a citizen of a friendly nation, whose vessels must submit to search and

a 4 Rob. Adm. Cases, 116.

Howland *vs.* the brig Lavinia.

I have cited, on former occasions, principles of the common law, (in which I still believe) in support of the doctrine influencing my judgment. These principles are to be found in the oldest and most venerable common law authorities. I did not exclusively, or in any important degree rely on them; though I called them in as auxiliaries. I am well aware that modern opinions clash on this subject—I have looked into the oldest books as being nearer the time of the establishment of common law principles, *Melius est petere fontes, quam sectare rivu-*

adjudication. He was brought into the difficulty "in the *service of the vessel*," and, on *that account*, his case stands in the same equity with that of one *sent* in the service of the ship, on special mission, and taken by rovers or pirates, or wrecked. His misfortune occurred *on account of his service, connected with and as it related to, the ship*, and not to the nation whereof he is a citizen. A belligerent seaman is a subject of capture by the enemy of his nation *in any ship*, but the neutral mariner, only, by being found in the vessel subjected to search, restraint and adjudication. Though the vessel may be condemned for unneutral conduct, the person of the mariner is free. If the vessel be acquitted, he is bound, if present, to continue his services, not under a new contract, but in conformity with his original agreement. The *recapture*, as it is called, by one belligerent, of a neutral in possession of another, and the payment of salvage, is most frequently arbitrary, and settles no principle on which the first contract is dissolved. I have therefore thought it just that the seaman should pay his proportion of salvage; because that was the price by which the fund out of which his wages are payable, was redeemed from temporary, and too frequently unwarrantable, restraint. I cannot perceive a similitude in the case of seizures of neutral ships, to those of prizes taken from each other by nations at war.—Less similar are the cases of individual mariners who are neutrals, to those of subjects of belligerent parties.—1804.

los. It is well known that many of the principles of the *civil* and *Roman law*, are engrafted into the system of the *common law;* though, *as principles of the civil law*, common lawyers will not acknowledge them. I do not think that the difference of opinion, in the case of a servant, is important in this question. A seaman is not in a similar predicament; no fund is peculiarly appropriated for payment of wages, to servants or labourers; but a seaman is entitled or not to his wages, according to the fate of a particular fund, to wit, *freight.* If this fund is lost, he suffers with the merchant, and reaps not the rewards of his dangers and his toils.

Howland vs. the brig Lavinia.

Civil and Roman law engrafted into Common law.

Freight the fund for seamen's wages; and they participate in its risk.

The soundness of the law maxim is proved by a just transposition of its terms, *Qui sentit onus, sentire debet et commodum.* He loses also his right to this, by fault, negligence, fraud, or non-performance of contract, flowing from wilful malfeazance, misfeazance, or gross neglect. But he ought not to suffer, or have his risk or responsibility encreased, by circumstances he cannot control, where the fund, though temporarily in danger, is ultimately safe.—Decree for the libellant.

An incident in this cause, produced an examination into the subject of *passage money*, and the court delivered the following opinion.*

* This was an *incident* arising out of, and connected with, the general affairs of the ship; the original cause being incontrovertibly within admiralty jurisdiction. However applica-

Howland vs. the brig Lavinia.

Court.—On principle, the same rules are to be applied to *passage money* as are established on the subject of freight.[a]

Passage money and freight governed by same rules.

This vessel had touched, without intending to end her voyage, at a port distant from the port of destination, but was obliged to unlade, and could not proceed.

None due before arrival at destined port, unless by special agreement.

No *passage money* is due before the passenger arrives at the port of destination, unless compensation *pro rata itineris*, is agreed to be paid. His expenses, or the means of proceeding to the place of destination, must be paid, or tendered, to a passenger. On refusal to proceed, compensation *pro rata* is demandable. If the passage money has been paid before hand, it ought to be refunded, on the principles before stated. So *freight* on goods is not payable, 'till delivery at the port for which they are shipped. If by stress of weather, or other cause, a ship puts into another port, and unlades, or if she is

[a] Molloy, 256. 260.

ble some general principles may be to its being within the jurisdiction of the admiralty, as a contract made on land "to be performed on the sea," I have always leaned against taking jurisdiction in disputed cases; such as *freight*, &c. though ancient authorities would justify me in so doing. It will be seen, in decisions hereafter, that in the distribution of *remnants and surplus* of monies in court, I have avoided taking cognizance of claims, unless *liens* were *precedently* attached to the *things*, from which the monies were produced. In transactions, where the commencement and consummation of the contract were, exclusively, *on land*, I have held it, *in general*, very disputable, at least, whether the jurisdiction attached, though the intermediate and indispensable portion of performance, was *on the sea*.—July, 1806.

wrecked, and goods saved, these must, at the expense of the owners of the ship, be transported to their destined port before freight is payable. The subject of passage money produced in a case mentioned by Photier 315. 409, a curious discussion.

Howland vs. the brig Lavinia.

Pothier

SEAMEN'S WAGES.

Bordman, Wilson, and others, mariners,
versus
The brig Elizabeth.

1798.

The seamen of a vessel sent in for adjudication, were carried off by the capturing frigate, and afterwards liberated, when they might have rejoined their vessel which was acquitted, and earned her freight. Wages allowed to the time the seamen might have rejoined their vessel.

THIS was a case, in which several seaman of an American ship,* carried into a port of a belligerent captor for adjudication, claimed their wages for the whole voyage. They were forcibly taken out of the Elizabeth, and put on board the capturing frigate. They were carried into another port of the captor, and there liberated. It appeared in evidence, that the seamen were informed of the place in which their vessel lay, and that it was in their power to rejoin her. She was finally acquitted, proceeded on her voyage, and earned her freight.

Wages, *pro tanto*, to the time the seamen were liberated, were decreed. As to the residue claimed for the voyage, the libel was dismissed.

It was held that the sailors, not being in fault until they neglected, when liberated, to re-enter the ship, should be paid to that time. [a] Full wages were given in a similar case, where a mariner had it not in his power to re-enter on board his ship.

[a] Hart, *vs.* the ship Littlejohn, ante page, 121.

* "*Ship*," in the maritime laws and language, is a *generic term*, including all vessels; without attention to *specific* description.

SEAMEN'S WAGES.

Bordman et al. vs. the brig Elizabeth.

The port, in which some of the mariners were landed, was at some distance from that in which the ship lay. There appeared some ground for the seamen to entertain an opinion, that their ship would depart, before they could travel to the port in which she then was. This, in the opinion of the judge, repelled the charge of unlawful intent. If they had wantonly, and without any reasonable excuse, or merely with a view to other employment, neglected or refused to rejoin the ship, it would have amounted to desertion, and forfeiture of all claim to wages. The mariner is bound to rejoin the ship, whenever it is in his power; and the master is under an obligation to receive him. If, on either side, there have been latches, in this respect, decrees have, in sundry instances, been given against the master, or mariner, as the one, or the other, was in fault.

Wantonly neglecting or refusing to rejoin amounts to desertion.

The Judge said, that he had, on summary examinations, under the act of congress, in many cases, established the following positions:

Positions ruled, in sundry cases, of vessels carried in for adjudication.

First. That seamen are bound to remain with a neutral ship, carried by a belligerent party, into a port of the captors for adjudication.

1. Seamen bound to remain with the ship.

Second. That a voluntary abandonment of their duty in this respect, amounts to desertion and forfeiture of wages.

2. Voluntary abandonment of this duty, a forfeiture.

Third. But where they are prevented from remaining on board, either by the captors, or the master, or have not provisions, or accommodations, and are without money, or means of subsistence, they are not chargeable with any consequences.

3. But not where prevented from remaining on board.

Fourth. That while they remain to assist in preserving the ship, and ready to proceed on the

4. While they remain, they are entitled to wages, &c.

Bordman et al. vs. the brig Elizabeth.

voyage, they are intitled to their wages, and the master, or owner, is bound to furnish them with provisions, or money, for subsistence. Yet, if the master chooses to permit their return home, they may so return, without prejudice to any claims they legally have, depending on the fate of the ship.

They may be permitted to return home, without prejudice to their claims.

Fifth. That seamen are not bound to remain with, or near, the ship, after an unfavourable adjudiction in the lower court of admiralty of the captors, though an appeal may be entered, and the vessel remain in custody and unsold. But they are bound to wait, if required, for this adjudication; not only to take care of the ship, and her cargo, if permitted so to do, but to afford their testimony in the cause, when required to be used on the trial, in the first instance, and transmitted among the *apostella*, in case of appeal.

5. Bound to wait for the first adjudication, and not longer.

Sixth. That where a vessel is carried in for adjudication, condemned in the lower court of admiralty, and an appeal is entered, the claim for wages must be suspended, 'till the event of that appeal is known. If the owner recover *freight*, or damages in lieu thereof, or the ship be restored, the wages are due, and must be paid, when, and not before, he receives compensation, or recovers the ship.

6. Claim for wages suspended until the fate of the ship is decided.

If restored, wages for the voyage must be paid.

Seventh. The carrying in a neutral ship for adjudication, or even if she be legal prize, does not in any event, interrupt or defeat the claim of the seamen to wages, for a former part of the voyage, in which freight has been earned. The seamen must recover wages to the last port of delivery, and for half the time the vessel staid there. The period of stay, at such last port, being thus divided, on a supposition that the one half thereof, is taken up in

7. Condemnation does not defeat the claim of wages for a former part of the voyage.

discharging her cargo, and the latter half in re-loading the ship. This latter half of that period, is accounted a portion of another part of the voyage, and the wages accruing therefore, share the fate of the ship, in the voyage interrupted by the capture.

Bordman et al. vs. the brig Elizabeth.

SEAMEN'S WAGES.

James Watson,
versus
The brig Rose.

1806.

An American seaman impressed, and the vessel permitted to proceed—wages claimed by him, for the voyage, refused.

THE libellant, being a *citizen of the United States*, and one of the crew of *an American vessel*, was impressed by a British cruizer; and the ship permitted to proceed on her voyage. The case was opened with a view to obtain wages for the voyage, under principles settled in this court, relating to mariners taken and carried off by force, out of vessels taken and retaken and proceeding to their ports of destination, and earning freight.

Court.—I have never extended any decision so far as to reach this case, when unconnected with other circumstances. I think it would be stretching the principle to an extreme. This practice of impressing our seamen, has been often and ably discussed, in other departments of our government; and I am under no necessity to enlarge upon it. Seamen, really American citizens, are not legally amenable to this outrage, and tyrannical exercise of belligerent force. But mariners, in neutral ships, are lawfully subject to be carried in by belligerents, for adjudication, in cases warranted by treaties, or the laws of nations. The person of a mariner belonging to a belligerent nation, is, as a member of that nation, subject to capture by his enemy. But one of a neutral country is not liable to restraint,

except where his case relates to, and is connected with, the ship in which he is found. I know that some instances may be cited, of seamen carried off by pirates, or sea rovers, which may be deemed to bear on this question.* But I endeavour, as far as practicable, and consistently with general principles, to put every case on its own circumstances. A mariner of a neutral vessel, carried off by captors, on the arrest of the ship for adjudication, participates in the general circumstances of all the crew, as to the fate of the ship; and this as a member of the crew.[a] If she is discharged by the court of the captor, he, in common with others, has the advantage of saving his wages; though the neutral merchant incurs both loss, expense and inconvenience, by a casualty to which he is liable, as part of the terms on which he enjoys his trade. The separating the crew, by carrying off one or more seamen, is an injury to the neutral merchant, who is thereby reduced to the necessity, if his vessel is released, of hiring other seamen to complete his crew. But, the neutral seaman, abstracted by this unjustifiable act of power, should lose none of those rights, to which he is entitled as a partaker in the fate of the ship; though, after separation, further outrage should be added, by compelling him to serve in a belligerent

J. Watson vs. the brig Rose.

Seamen carried off by pirates, are detached from the rights common to the crew.

Mariner carried off, and ship sent in for adjudication, shares the fate of the ship.

[a] See ante page, 121.

* The better opinion of writers, on this subject, seems to be, that if a seaman is carried off by a pirate, as a hostage for the release of the ship and crew, his wages and ransom must be paid. But if forcibly and unconditionally taken, jurists are not generally agreed, on this point.

J. Watson vs. the brig Rose.

ship. It lies with the merchant, to charge, in his account of damages against the captors, the extra expense occasioned by the dispersion of his crew. But one impressed, where the ship is permitted to proceed, is personally wronged; and the more so, by being prevented from fully executing his contract, and unjustifiably detached from the benefits, common to the rest of the crew. He must rely, whatever may be the result, on the protection due to him by his government, for the redress he is entitled to, as well for losses sustained, as personal injuries so unwarrantably suffered. The unlawful impressment is an injury done to him, specially and individually; and has no ingredients common to all the crew.

Mariner impressed, must look for redress, to the government.

There will often arise some anomalous occurrences, form what general rule we may. In one or two instances, I have decreed wages for the voyage, where sailors were carried off from a ship being arrested, *with intent* to send her in for adjudication, but those left on board regained her, resumed her former course, and she arrived at her port of original destination, and earned her freight. It was alleged, that extra payment had been made to those who brought in the ship. But principles cannot fluctuate with the debit and credit sides of accounts. They must be general; and special cases, not clearly marked with distinct character, must yield to them. The tints of distinction in these instances, from the general class of cases, governed by the principles before stated, were not sufficiently strong, to form exceptions to the general rule.

Ship arrested with *intent to send her in*, but rescued, and earns freight. Mariner carried off from her is entitled to his wages.

SEAMEN'S WAGES.

J. Watson vs. the brig Rose.

Seaman impressed, but escapes and rejoins ship, wages allowed.

In a former case, where a seaman was impressed, and the vessel permitted to proceed, I decreed wages for the voyage; because the seaman, after a short detention, rejoined his own ship, and performed his duty during the remainder of the voyage. Such temporary interruptions should have no more effect on entire contracts, than short detentions, on insurances; which are not affected when a ship, being for a time in jeopardy, but speedily restored to safety, arrives at her intended port.

Wages allowed to one who had been impressed—escaped—tendered his services—but was refused.

Wages for the voyage were also decreed to a mariner who had been impressed, escaped, and followed the ship; and overtaking her at a port in the course of her voyage, tendered himself as ready to re-enter, and perform his contract, but was refused. I have pursued this principle uniformly. If seamen are separated by the *vis major*, and it is, at any time during the voyage, in their power to rejoin the crew, and they do not, I have refused wages thereafter. Where they comply with this obligation so far as they can, by following the ship and offering to re-enter, but are refused, I consider this tender and refusal, according to the maritime laws, a restoration to their contract. So also of sailors having committed faults, repenting and tendering their services and amends in reasonable time.

Policy, liberality and toleration of maritime laws.

The faults of seamen, however reprehensible, contribute to the prosperity of commerce.

The wise policy of maritime laws, looks farther than cupidity permits individuals to see, when their immediate interests render them regardless of *general* advantages. These laws enjoin liberality to relieve their misfortunes, and toleration for the *faults* of seamen. However much *these* are morally to be deplored, and should be repressed and discouraged, they produce necessities in mariners,

J. Watson. vs. the brig Rose.

which compel a perseverance in their occupation, without an intermission. Thoughtful, calculating men, though anxious, as mariners generally are, *to get*, without their propensities to *dissipate*, both their time and their money, would either never undertake, or soon abandon, the subjection, hardships, vicissitudes, and dangers of a maritime life.

The system of maritime law is, in its combinations, just; and calculated by the experience and wisdom of ages, for the support and prosperity of commerce. Few, even of the most eminent *common lawyers* study this system in all its relations. They view only particular parts, as they are occasionally employed in them. The branch of it, relating to mariner's contracts (on which *Photier*,* among others, has given us a most valuable discussion) has been peculiarly, and by those who have classed it among the inferior grades of jurisprudence, too fastidiously, neglected. It is not then surprising, that others should form partial and erroneous judgments (and these not seldom excited by immediate interest) on this complicated subject; which will be found, even to those much travelled in other departments of law, a new, and unexplored region. It is much to be regretted, that more attention is not paid to this essential requisite, in both legal and commercial education, in a country rising to the first rank of capacity for *naval*, and in the actual enjoyment of *commercial*, importance. On a careful investigation, it is questionable whether it will be found, that *our laws*, loosely and obscurely worded, have introduced salutary alterations. Like intended improvements on the common law, they

* Photier Louages des Matelots.

leave the system mutilated; and, with a very few exceptions, the worse for attempts at reformation.

J. Watson *vs.* the brig Rose.

The framers of maritime laws, knowing that seamen are, by the nature of their employment, subject to peculiar failings and vices, the offspring of unpolished manners, and hardy, rude, and fearless habits, have calculated their codes for reformation, where practicable, and for punishment, where this cannot be effected. Heavy forfeitures, pecuniary mulcts, and corporal inflictions (many now obsolete and disused) are to be found in those laws, frequent and severe. But, where these can be balanced by indulgences and encouragements, they are always enjoined; to the end that this vocation may not be rendered odious and forbidding; so as to deter the subjects or citizens of commercial states, from entering into an occupation so radically necessary, and all-important, to the commerce, and and only sure defence, of commercial countries.

Objects and principles of maritime laws, as they respect seamen.

Williams,
versus,
The brig Hope,

1798.

A seaman left sick at a foreign port, and recovered. He might have rejoined the ship, but would not; and claimed wages for the voyage, which were refused, and only allowed until the time when he might have rejoined.

JOHN WILLIAMS a seaman, was left sick in a foreign port and recovered. The ship, on a circuitous voyage touched at a port, where the seaman also came on his way home; being one of the crew of another vessel. He could there have rejoined his ship, but refused, because, as he alleged, the ship had her complement of men. Wages were claimed for the voyage, which the court would not grant; but decreed payment to the time the sailor had it in his power to re-enter under his original contract, deducting what he had earned after his recovery from sickness, and until that period.[a]

[a] See the case of *Bordman et al. vs. the Elizabeth*, in which the principles adopted by the court in cases nearly resembling the present, are fully explained. Ante page ~~104~~. 128

SEAMEN'S WAGES.

Andrew Malone,
versus,
William Bell, owner, and John Daly, master,
of the brig Mary.

DECREE.

1805.

THIS case was heard on a libel for wages during a voyage. The seaman was left, in the Havanna, sick in a hospital, where he was ordered, as the respondent alleged, to stay until the return of the brig Mary from a short voyage, to that port, where she intended to obtain part of her home cargo. The sailor did not stay; but came home in the brig Smilax, which sailed for Philadelphia, previous to the return of the Mary to the Havanna. He claimed wages for the voyage.

A seaman left sick in a foreign port, and ordered to stay until the ship returned; but left the port. Ship returned and found he had sailed in another vessel.

In this case several points arose.—

1. It was insisted by the respondent that the articles which were produced, with the signature of the sailor by the name of *Malone* were not sufficient proof that he was actually on board.

The judge was of opinion that the articles are *prima facie* evidence of the fact, and must be taken as such till the contrary appears.

Ships articles prima facie, evidence of the seaman having been on board. Misnomer in the entry in log-book.

2. A charge of one day's pay for absence each hour, after that appointed at the foot of the articles for rendering on board, was made by the respondent. It appeared that the sailor (whose having gone by different names, was offered to be proved) was entered in the log-book by the name of "Mil-

Malone vs. the brig Mary.

ler," as coming on board two days after that in which the hour for rendering was designated.

The libellants counsel contended, that although the act of Congress is imperative on the keeper of the log-book, to make an entry of the absence and coming on board of a seaman, yet the fact ought, in addition to the entry, to be proved by other testimony. The copulative "and" shews that it is only part of the proof.

By the act of Congress the log-book entry is made proof of the time of entry on board, &c.

The judge was of opinion that the entry in the log-book is made by the act of Congress, legal evidence of the time of coming on board, and of the absence occasioning the mulct, on the delinquent seaman, of one day's pay for every hour's omission to render himself on board. He said that it would be highly embarrassing to masters and owners, if this fact required supplementary proof. The compulsion upon the mate, or keeper of the log, to make the entry, was introduced to control the general rule of law, that receiving a seaman on board who had committed an offence, amounts to a release or pardon. This case must be an exception to that general rule: for if the receiving on board is to be construed as a release, the penalty could in no case be exacted. The law would, on that construction, be rendered nugatory. The entry in the log-book is therefore necessary, to shew that no release was intended, as well as to ascertain the fact with greater accuracy. In the case of desertion he said he had always considered the entry in the log-book evidence of the fact; but not conclusive, though indispensably necessary. In this case before me, as well as in that, testimony had been admitted to prove permission to enter on board at an hour or time

Receiving a seamen on board after he has neglected to render himself at the time appointed, does not remit the penalty.

In cases of desertion the entry on the log-book is necessary, but not incontrovertible.

different from that mentioned at the foot of the articles; and in the other case, leave of absence proved, has controlled the charge of desertion, *prima facie* proved by the entry. In a penal law strict compliance is required. He thought the entry in the log-book, by the name of "Miller," was entitled to further consideration.

Malone vs. the brig Mary.

3. The captain (who was made a party in the libel, but no process had issued against him) was offered as a witness to prove the facts alleged in the respondent's defence.

Captain a party in the libel, but no process against him. Offered as a witness, and refused.

The judge said that in these cases, he had constantly refused to admit the captain. He is liable for the wages, at the will of the mariner, who has several remedies, though he can have but one satisfaction. Protests had been entered against this opinion; but they had never been prosecuted before the superior court. It was his wish, that the point should be put in a shape, to be determined by the circuit court. The master he conceived was interested in the result; though not immediately. If a decree passes against the seamen in a procedure *in rem*, or against the owner, it may be given in evidence to repel a suit against the master.—The master was rejected as a witness.[a]

[a] The parties in this case compromised, and no final decision was given.

Walton, administrator of Strum, and Armstrong, administrator of Pagel,
versus,
The ship Neptune.

1800.

DECREE.

The seamen shipped for the whole voyage of the Neptune, and died before her return to Philadelphia. Their administrators claimed wages until the return of the ship, which were allowed by the court.

THE mariners shipped at *Philadelphia*, the twenty-first day of December, one thousand seven hundred and ninety-nine, at the current monthly wages, to perform a voyage to the *Havanna*, and back to *Philadelphia*. They died, through accidental illness, of a prevailing fever at the Havanna, while in the service of the ship. The libellants claim wages as due to the decedents, for the whole voyage, allowing funeral expenses and physicians' bills. The ship arrived at Philadelphia, and earned her freight. The owner alleges, they should only be paid, *pro tanto*, to the time of their respective deaths.

The laws of *Oleron* contain the principles of all the maritime laws of the *European western nations* concerned in commerce; with some particular exceptions in particular cases. They are yet in force, and acknowledged in their great and leading principles, by all the trading nations; though some of their harsh and severe punishments and pecuniary mulcts, for crimes and offences, are out of use. Whenever any of their regulations are modified or contradicted, they are so modified or opposed by special ordinances, binding only in the particular state making them.

Walton et al. vs. the ship Neptune.

Thus in *France*, by the thirteenth and fourteenth articles of the twenty-ninth section of the Ordinances of *Louis the Fourteenth*, it is declared, that "the heirs of a seaman hired *by the month*, and dying in the voyage, shall be paid his wages, until the day of his decease. The half of the wages of a seaman, hired *by the voyage*, shall be due to his heirs, if he dies outward bound; and the whole, if he dies in the way home. And if he sailed by the profit, or freight, his heirs shall enjoy his full share, if the voyage be begun before his death." Yet even in this modification, the leading principle is preserved, of payment of full wages, or freight; in the two latter cases, because the sailor was not in fault, but by an inevitable casualty, was prevented from fulfilling his contract. There is a similar distinction in the ordinances of *Charles the Fifth*, as to a sailor dying in the outward passage, when his heirs shall have half; and if on the home passage, they shall have his full wages. But in *Spain*, where their seamen are treated with peculiar strictness, there is a local custom, that "in ships of war on *India* voyages, if a man die the first day of the voyage his heirs are to be paid as much as if he had completed it." Herein preserving the general principle on which I have dilated in the case of *Joseph Hart* against the ship *Littlejohn*.[a] In that case, and in this, I consider the contract to be *for the voyage*, though *monthly* wages are stipulated; to take from the mariner the risk of long, and to give to the owner the advantage of short, passages. The terms of the shipping articles prove this, and the forfei-

In the shipping articles used in the U. States, though wages are designated *by the month*, yet the contract is entire *for the voyage*.

[a] Ante page 115.

Walton et al. vs. the ship Neptune.

tures, incurred by desertion, go to the whole due the sailor, for the preceding part of the voyage, and not solely to the month in which the forfeitures attach.

Freight is always the rule of wages.

I have always made *freight* the rule. In a former case in this court, wherein an attempt was made to cut the seamen out of their wages, for the whole of an East India voyage, by making them payable only on the ship's return to Philadelphia, I decreed wages as far as freight was earned, the vessel having been captured on the home passage. I did not then recollect a stronger case than that before me.[a]

The seventh article of the laws of *Oleron* is clear, in my view, to the present question. It makes no distinction between the out and home passage. In this article, after declaring what shall be done with a mariner falling sick, and left on shore after the departure of the ship, it is ordained—"But if he recover he ought to have his full wages; deducting only such charges as the master has been at for him, (to wit, better diet than the ship afforded, or more provisions than he required on ship board), and if he dies, his wife or next of kin, shall have it," *i. e.* his full wages.

The 59th article of the laws of *Wisbuy*, the 45th of the laws of the *Hanse Towns*, and the 56th of those of *Philip the Second*, which he compiled for the *Low Countries*, were all founded on this law of *Oleron*, and agree with it exactly, both if he recover his health or die in the voyage.—See note on the 7th article *L. Oleron*.

[a] 2 Vern. 727.

SEAMEN'S WAGES.

In one of these laws, the expression is general "he shall be paid his wages, if he recover," which, if explained by the laws of Oleron, certainly means "his full wages." But in the other law, it is more clearly expressed, "he shall be paid his wages as much as if he had served out the whole voyage." And in the event of death, I have no doubt that the words "his heirs shall have what was due to him" mean, according to the laws of *Oleron*, on which this is founded, "his full wages," or according to the preceding part of this same article "his wages as much as if he had served out the whole voyage."

Thus, by these wise and politic regulations, making attention to mariners the *interest*, as it was the *duty* of masters of ships. They or their owners sustain a loss by the death, but profit (in his services, and saving of the hire of another in his room) by the continuance of health, or recovery of the mariner from sickness. Hereby also giving encouragement to those who enter into this hazardous and laborious employment. Some provision being, in this way, made for them if they survive, when lingering under convalescence, or ruined by disability, occasioned by sickness or accident; or for their families, in the event of their death.

This benevolent principle has always been attended to by enlightened nations. It is established in the most respectable codes of jurisprudence, among the general and leading points of justice, in contracts for personal services of every description. Common law authorities can be produced in support of it: it is grounded in the wisdom of ages. We find it recognised in the Digest of *Justinian*, law 38, page 58, "He who has hired his services

Walton et al. vs. the ship Neptune.

is to receive his reward for the whole time, *if it has not been his fault* that the service has not been performed." The laws of the *Rhodians* are inserted in this digest.* These are the most ancient sea laws

* This fact I had taken from respectable authorities, and presumed it correct; although I knew it had been doubted by some, and contradicted by others. Among those who do not consider the parts of those laws now extant as genuine, is *Bynkershoek*, whose opinion has always great influence. A late writer (*Azuni*), who has treated with ability and extensive knowledge on maritime law, but is not free from prejudices on particular points, has taken much pains to prove, that the whole of the *Rhodian* laws were not inserted in the digest of *Justinian*, though one of these laws relative to *jetison*, is to be found therein. He cites and comments on a number of authors for and against the authenticity of the fragments generally received as parts of the *Rhodian* laws; and concludes against their being genuine. He asserts, that these supposed *Rhodian* laws, are productions of more recent date, and fabricated by more modern Greeks. He brands them with the character of "*trash*"; yet, however accurate his opinions may be in other respects, I see not that they merit an appellation so vituperative. They contain many of the valuable principles of maritime law, though (as light things float long) some of the least important may have been borne down to us on the tide of time. It will be seen, on examining the authorities, many whereof are cited by *Azuni*,* that these fragments were discovered in *Pithou's* library, and first printed in Germany, by *Simon Scardius*. The *Greek* was the original language, in which these ancient laws were written. But *Azuni* discovers some *modern Grecisms* in *Scardius'* copy. The evidence, appearing on the face of them, of this language is, so far as it goes, rather a proof of authenticity; even if some corruptions from the purity of the original may have crept into, relatively, modern copies. Many ancient manuscripts and authentic classical works have been discovered in monasteries,

* See Mar. L. vol. i, p. 265, & seq. and notes, New York, ed. 1806.

extant. They were adopted for the most part by the *Romans*; and we see their principal features in the laws of *Oleron*. One of these laws (article 46, Rh. laws) directs "That if the ropes break and the

Walton et al. vs. the ship Neptune.

where they have lain neglected for ages. *Poggio*, in the 15th century, recovered in *Germany* (where these fragments were found) as well as in *Italy*, some of the most valuable of the Roman classics, buried in rubbish and dust, in cloisters and other obscure places, where only one of his industry and talents would have sought for or found them. *Pithou's* library was a depositary more respectable; and *Marquardus*, *Freer* and *Leunclavius* were the editors of the laws found there, and considered them authentic. They were persons of the first grade of literary character. The *Pandects* were discovered at *Amalfi*, or *Pisa*, (for this is not clearly ascertained) in places no more important to their credit, than the library of *Pithou* was to the Rhodian laws, said to be there deposited. Nor are those who attest the facts, as to the *Amalfi* or *Pisan* copy, or copies of the *Pandects*, more credible than *Freer*, or *Leunclavius*. The *Pisans* enobled M. *Azuni* for attributing to their predecessors the *Consolato del Mare*, and the discovery of the *Pandects*. It appears, however, be the fact of the authenticity of the Rhodian laws as it may (according to the allegation, after due examination, of the able American translator of *Azuni's* work, to whose labours and information I am much indebted) that the English compiler of the "*Sea Laws*," a book generally of good authority, is egregiously mistaken, when he asserts that, these fragments of the Rhodian laws are to be found in the *Italian* copy of the Pandects or Digest; and this copy has been most generally considered the only genuine remains of that important collection. It is nevertheless not incredible, that there were other copies of the compilations made by *Justinian* and his coadjutors, than those found at *Amalfi* or *Pisa*.

This controversy has divided the learned for a long period; and must be left with those who delight in such investigations. Those who desire to gratify their curiosity, may consult 'Schomberg's Chronological View of the Roman Law,' where the subject of the *Justinian Pandects*, *Code and Novels*, and that of the *Basilican code*, is concisely treated, and the authorities cited.

Walton et al. vs. the ship Neptune.

boat goes adrift, with mariners in it, and they perish at sea, the master shall pay their heirs one full year's wages." This article has been held to be a mulct on the master for having bad ropes; but we see no such assertion, in the text of the article. It proves, at any rate, the early attention paid to the families of deceased mariners, by commercial nations.

It does not appear less probable that the *Rhodian laws* either entire, or digested, and published under one of the Greek emperors in their original language, were in existence in 876, in the time of the emperor Basilius, than that the Pandects should be found at *Amalfi* in 1135 or 1137. The Greek copy may have been preserved in *Germany*, and there discovered, as many such ancient manuscripts have been, in that district of the empire.

Having conceived and declared that, "the laws of the Rhodians are inserted in the Digest," I considered myself bound to give some account of the subject. But I have no desire to enter into an unnecessary critical investigation, or controversy, on a topic in which I may have been mistaken, and misled. I have fallen into an error, if such it really is, in common with many others. After all, this assertion is, beyond dispute *substantially* true. It is agreed on all hands, and conceded by *Azuni* himself, that the *Rhodians* gave the principles of maritime law to the *Romans*, who adopted them into their code. Their leading character is allowed to be engrafted in the *Roman*, as well as subsequent sea laws. See Azuni on this subject. Whether the laws, in the very words in which they were originally promulgated, or only a summary of, or commentary on, them, "are inserted in the Pandects or Digest," is immaterial; if their general principles and distinguishing features are handed down to us. We have indisputable maritime laws, competent to guide and govern us, if what we have heretofore deemed the *Rhodian* laws should be rejected as apocryphal. The principles of the venerable *Rhodian code* are indubitably transfused into systems yet extant, and in high estimation. These principles have survived the ravages of barbarism, and the vicissitudes of fortune, which have reduced to imbecility and obscurity, the

Walton et al. vs. the ship Neptune.

The provisions of the general maritime laws, and the principles of the *Roman*, or *civil* law, I am bound to respect, when relevant to points before me, in my decisions on the admiralty side of this court. We have no act or ordinance of our own nation, comprehending the case in question. Having entered into the society of nations, we must therefore be regulated by the general laws which govern in maritime cases.

Hiring a seaman in place of the one dead, has no influence on the general principle.

I do not see that hiring a mariner in the place of the sick, disabled, or deceased seaman, (which is an obligation on the master, or he risks his insurance, or the safety of the ship) alters the principle of the case. It has an effect on the profit of the merchant, always subject to chances; and the death or sickness of mariners, is among his other risks. But it is beside the question of law. This profit is as much diminished by hiring in the room of sick or disabled mariners, (and their number is of no import as to the principle) as of those dead. The *Spaniards* oblige a sick or disabled mariner, to pay for one hired in his stead. But this is reprobated by the writers of other nations, as a severity peculiar to *Spain*. The argument, applicable only to a mariner recovered from sickness or disability, and left in a distant country, leaves the case where it finds it. These mariners are said to be entitled

once powerful and celebrated people, with whom they originated. *Time*, which has exterminated every monument of their wealth and splendor, has perpetuated these more durable memorials of their policy, wisdom and justice; by disseminating them through distant regions, and extending their inestimable advantages to remote generations and races of men.

Walton et al. vs. the ship Neptune.

to their wages, only from the peculiarity of their situation, *i. e.* to enable them to get home; yet they do not receive them till they arrive at home: whither they most commonly work their passages; and if they do not, but receive wages, these are deducted from their demands. If the mariner had arrived *in the ship*, though from sickness or disability he had done no duty, his claim to his full wages, would be equally legal. The subject must be viewed on a more extensive scale, than as it affects the interests of individuals. I conceive it to be for the great and general interests of commerce, and much for its reputation, that, at some particular sacrifice of gain, encouragment and support should be afforded by those who profit by their services, or hire them with that object, where mariners are unfortunate and faultless. Occasions too frequently happen in which they merit, and incur, severe forfeitures and punishments.

Although the sum in demand in this case is small, the subject often presents itself; and I wish to put the point at rest here, until an occasion for an appeal offers. I must be guided by what I conceive fixed principles, which ought not to be shaken because temporary inconveniencies casually occur. I wish it to be understood, that, in the application of the general principles here I do not lose sight of the limitation mentioned in the case of the *Littlejohn*. All general rules are subject to exceptions.

Capture interrupt, or wreck destroy, the voyage. Ship seized for debt.

Capture or *wreck* interrupt or destroy the voyage. The sick mariner, or the heirs of one dead, can only receive wages out of the freight earned; and so far as it is earned. And in the case of a ship seized for debt, or forfeited through the owner's default,

wages will be received though no freight be earned. By full wages I therefore mean, as much as he would have been entitled to, had he been on board and met the fate of the ship. In the case I have now to determine, the freight was earned for the voyage. So it was in the case of the *Littlejohn*,[a] with the deduction of *salvage*—to which, if it had occurred here, I should have ordered the libellants to contribute. They must now allow all sums, lawfully chargeable against the decedents.

Walton et al. vs. the ship Neptune.

What is meant by full wages.

Let it be also understood, that the sailor must not be in fault. If his sickness, disability or death is owing to vicious or unjustifiable conduct, he, or his heirs must bear the loss, *propter delictum*.

If sickness arose from the fault or vice of the mariner, no wages would be allowed.

I have looked into several common law authorities on this subject. By the common law, no contract for wages was apportionable:[b] it appears expressly on enquiry, by order of the court of C. P. in 1796, into the usage of the *British admiralty*, a disabled mariner "was always entitled to his wages during the whole voyage." And in this case, full wages were recovered at common law. The mariner's disability was occasioned by an accident, happening on board the ship, and he does not appear to have met it in doing actual duty.

Full wages allowed at Common law although the disability be by accident.

There is no difference as to wages, between the case of a sailor disabled on actual duty, or that of one taken sick, or, owing to no misconduct, accidentally disabled while in service. In the former case, he is to be *cured* at the expense of the ship;

[a] Ante page 115.

[b] *Bro. Ab. Tit. Apportionments. Labourers' Contracts.* See the case of *Chandler, vs. Greaves*, H. *Blacks.* 606.

Walton et al. vs. the ship Neptune.

Medicine chest.

in the latter, at his own charge. The ship, by act of Congress is bound to furnish medicines or pay the physician's bill:* but the sailor, when the ship is so furnished, must pay for chirurgical or medical advice and assistance. If left or put on shore (in lieu of the ship's provisions, ship-boy, or nurse ordered by the law of *Oleron*) his reasonable board wages must be paid by the ship.

The case in 6 Term Rep. 320, Cutter, *s.* Powell, was determined on the special agreement, and not on the general maritime law. A sum in gross, four times larger than the rate of current wages, was to be paid on terms which death prevented the mariner from performing. *Modus et conventio vincunt legem.* It appears in this case, that there was no fixed usage among the *London* merchants, in 1795, on this subject. The high wages given to our mariners, are

* Always bound to submit, with the respect I owe, to the laws, yet having frequently seen the inefficacy, and in several instances the danger, of medicines administered ignorantly, or carelessly, I have not been perfectly satisfied that the seamen should pay the bill for medical advice, which to complete the intent of the provision should be charges on the ship. But finding the weight of authority that way, I have yielded. It is certain that medicines administered without due knowledge of the disease, are as often fatal as the malady, if not more so. Congress *intended* a benefit to the mariner, but he had better pay for medical advice, than risk the consequences of indiscreet use of the medicine chest. In numerous instances, physicians' bills, especially in the *West Indies*, have balanced the claim for wages. By the terms in the alternative, in the act of Congress, that *if* the ship has no medicine chest, the owners shall pay the physician's bill, *it seems*, that if the ship is furnished with the chest, the sailor must pay for *advice*; but the ship must supply medicine.

general, and not confined to a particular case; they are contracted for under the shipping articles, and not by special agreement. They are caused by our neutral situation, which occasions great demands for seamen. The merchant's profit, or chance of it, is in proportion. High wages, are however, not confined to the maritime class of our citizens. But the principle is not affected by such fluctuating circumstances.

Walton et al. ve. the ship Neptune.

It is certain that I rely much on principles practised upon, in instances of sick and disabled mariners. I cannot distinguish these from those which should govern in the case of a mariner deceased. The law of *Oleron* couples them together, and is with me decisive. The ordinance of *France* has fixed a rule for that nation. This rule would give the libellants the full wages, if the decedents had died on the home passage. There are some grounds in point of fact, to warrant this application of their case to this rule, if it were necessary. The outward passage was ended when the ship arrived at the Havanna. The wages for the voyage must be paid, subject to all legal deductions.

I do therefore adjudge, order and decree, that the libellants, respectively, have and recover the sums following, that is to say, Elijah Walton, administrator of Matthias Strum, shall have and recover the sum of one hundred and thirty dollars, and Andrew Armstrong, administrator of Johannes Pagel, shall have and recover the sum of sixty four dollars and eighty-three cents, being the balance of wages due to the said Matthias Strum and Johannes Pagel, for the whole voyage. And I finally adjudge, order and decree, that the said ship Neptune, to-

Decree for full wages.

Walton et al. vs. the ship Neptune.

gether with her tackle, apparel and furniture, or so much thereof as may be necessary, be condemned, and that the same be sold by the marshal of this district for the payment to the libellants aforesaid of the sums of money herein before decreed to them respectively, together with the costs and charges, legally accruing, in the premises.

SEAMEN'S WAGES.

Scott, administrator of Ellis,
versus,
The brig Greenwich.

1802.

A seaman died on the returnvoyage, and wages claimed by administrator until the arrival of the ship. The court gave wages until the time of the seaman's death, and ordered the balance in dispute to be lodged in court until the determination of an appeal in another case involving the same principle.

THE mariner died on the *home passage*. Payment to the time of his decease, agreed to be paid; but the residue for the voyage disputed.

Court. I have determined this question upon deliberation; and my decree may be seen in the clerk's office. I am obliged to decide this, and many points arising here, on what I conceive to be the principles of the maritime laws. I find in many cases few, and in some, no decisions in the books to guide me. I have seen no reason to alter my opinion. I perceive in a late *English* publication, that the writer (Abbot, 356, &c.) is *doubtful* on this question, He says, "there is no general decision on this subject, in our law books." He alleges, "that *it is not clear* whether the payment thus directed, is to be understood of a sum proportionate to the time of his service, or of the whole sum earned, if he had lived to the end of the voyage." He cites much at large, the case of *Cutter vs. Powell*, 6 Term Rep. on which I have heretofore remarked. It appears to my mind, and if my opinion is erroneous, it is in a train to be corrected, that the maritime laws have not left it *doubtful*, but to me *clear*, that the wages must be paid for the whole voyage. He (Abbot) agrees, and cites authorities to prove, that, by the maritime laws, wages *for the entire*

Scott vs. the brig Greenwich.

voyage, are due, though inability to do service has occurred by any casualty in actual duty, or by natural sickness. I have before made my observations on the analogy between those cases, and that now before me. The relative bearing of a point on the whole system, is necessary to a correct conclusion; and in this case, perhaps, more so, than a partial view of it under its own circumstances. My habit is always *to decide* according to my best judgment. I never prolong litigation, when my own mind is satisfied, because differences of opinion arise on questions brought before this court. Decision here, forwards final determination, if the discontented party chooses to appeal. There has been an appeal, in another case, long depending in the superior court. My practice is, when an appeal is depending (if *bona fide* intended to procure a decision, and not for delay) to order payment in posterior and similar cases, so far as the point is not questioned, and direct the litigated portion to be paid into court, liable to further order. Let the administrator in this case receive to the time of the seaman's death; and let the residue be paid into court, or stipulation be entered into therefor. If no steps are taken, in a reasonable time, to obtain the decision of the circuit court, I shall think myself warranted to effectuate my own judgment.*

* Many cases have been brought before the court in which the points here decided have been recognised, but it has not been thought necessary to publish any others.

The operation of these decisions, has been in some instances, extremely severe on ship owners; and their effect is now, in most cases, prevented by the insertion of a covenant in the shipping

articles, that "wages shall cease on the death of the seaman." Of the legality of this agreement no doubt can be entertained, and to its omission in their contracts, merchants must hereafter attribute any claims which may be made on them, by the representatives of seamen dying on a voyage.

Scott vs. the brig Greenwich.

In the case of *Jackson*, administratrix, *vs. Joseph Sims*, the claims of the administratrix were for wages during the whole voyage, although her husband had died before the return of the ship, on board which he sailed as mate. The district court, referring to the case of *Walton, et al. vs. The ship Neptune*, decreed full wages, and an appeal was entered to the Circuit court. The case was heard at the April Sessions, 1806, Moylan for the appellant, and Milnor for the appellee, and the decree of the District court was confirmed by the Hon. Judge Washington. By his politeness I have been favoured with the following copy of his opinion.

Sims, *vs.* Jackson's administratrix. } An appeal from the Dist. court of Pennsylvania.

THIS was an appeal from the district court where, upon a libel by the appellee, the executrix of her husband, for his wages as mate on board a vessel belonging to the appellant, for his full wages from Philadelphia to Batavia, and back. Although he died at Batavia, the court decreed accordingly. He was hired for the whole voyage, at the rate of $ 30 per month. He was paid up to the time of his death.

Moylan for defendant, contended that on common law principles wages are the reward of services, and if not performed they are not due. If a man be hired for a year, and die in the middle of it, wages are due to the time of his death. 3 Vin. Ab. 5. 6. 13, if a mariner be impressed, wages are only payable pro tanto. 2 Lord Raym. 1211. That this is not a hiring by the voyage, but by the month; in the former case a gross sum is always stipulated, Abbot 265. 273, 274; it was a contract for the voyage, and not apportionable; nothing was due, Salk. 65 The true translation of the 7th article of the laws of Oleron, of what has been translated full wages, should be "ready down." In 3 Bos. & Pul. 427, one judge was of opinion, that if a sailor

Sims vs. Jackson.

die on the voyage, his executors can only recover wages to the time of his death.

Washington, judge.—As I entirely concur in the opinion given by the district judge upon this question, and for the reasons assigned by him, I deem it unnecessary, to discuss the subject much at large. It is admitted that no decision is to be met with in the English books precisely like the present, nor have we any municipal regulations which govern the case. We must, therefore, resort to those marine laws which have always been acknowledged as authority in England, as well as in most of the European commercial nations, unless, where they have been altered or modified by the laws of particular states, but which alterations are binding only on those states.

The 7th article of the laws of Oleron declares, that if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship. Where the vessel is ready to sail, she is not to wait for him, but still he is to be entitled to his full wages if he recover; and if he does not, his wife or next of kin is to have them, deducting only such charges as the master has been at for him. Now the only questions in this case are—1. Did the mariner die on the voyage? 2. Does the expression "full wages," in the above article mean, such as he has earned by his services to the time of his death, or such as he would have earned had he lived and served out the whole voyage to Philadelphia. Most unquestionably the deceased was bound by his contract to perform the whole voyage, which is described in the articles to be from Philadelphia to Batavia, and back again; and he would have forfeited the whole, had he deserted the ship at any time previous to the return of the ship to Philadelphia. I agree with the judge of the district court, that the stipulation to pay wages by the month, does not break the entirety of the contract for the voyage, but only furnishes a rule to assess the quantum for the voyage. It protects the owners from an over payment in case of a short voyage, and the mariner against the risk of receiving too little in case of a long one. It prevents either from speculating upon the other, by accommodating the reward to the length of the service.

2.—Does the expression "full wages," apply to what would have been due if the mariner had served out the entire voyage,

Sims vs. Jackson.

or are we to limit it to such as have been earned by services performed.

If a certain sum for the voyage be agreed upon, that sum would constitute the full wages, and is distinguishable from no wages at all, as in case of 6 T. R. 320. *Cutter vs. Powell*, or, when they have been forfeited by the misconduct of the mariner, or wages pro rata when they have been partly earned or are not forfeited. But every doubt with respect to the meaning of that expression is cleared away by the decision in the case of *Chandler vs. Greaves*, (Hen. Black. 606. note) a mariner was engaged on a voyage from London to Honduras, from there to Philadelphia, and back to London. The articles were drawn in the usual form, and such I take to be the articles in the contract now before us. The mariner being disabled, and totally disqualified from rendering any future service on the voyage, was left at Philadelphia, and the vessel returned to London. The court determined that he was entitled to his full wages, and he accordingly received the same wages to which he would have been entitled had he proceeded with the vessel to London. This case, not only determines a principle which is in all its parts applicable to the present, but it accedes that full wages mean the aggregate amounts of all the monthly sums which would have accrued upon the completion of the voyage. This decision is expressly founded upon the 7th article of the laws of Oleron, which entitles a sick sailor who is left behind to full wages, and the same act declares, that what such sick sailor would be entitled to, passes to his widow or next of kin, in case of his death.

I am therefore of opinion that the decree of the district court ought to be affirmed.

1798.

Whitton and others,
versus
The master and owners of the brig Commerce.

The seamen had been absent from the ship forty-eight hours, and were entered in the log-book as *deserters*. They were received again on board, and on the return of the ship they claimed wages for the voyage. The court was of opinion that the mariners having been received on board again, the forfeiture of their wages was waived, and a decree was entered for the libellants.

THE brig Commerce had been on a long circuitous voyage of between two and three years. She touched at a foreign port, on her way home, where, on a difference with the master, the seamen went on shore, as it was alleged, without the master's leave. An entry, agreeably to the act of Congress, was made in the log-book, of their having been absent without leave, for the space of *forty-eight hours*. The seamen denied the accuracy of this entry. A reconciliation took place at the foreign port, and the sailors were received, without any new agreement. They continued to perform their duty until the arrival of the brig at *Philadelphia*, where the voyage ended. A suit was commenced against the master and owner for the balance of wages for the voyage. The entry on the log-book before stated, was offered to repel their claim to all wages precedent thereto, which were said to be forfeited.

Entry in log-book produced, to repel claim to all precedent wages.

The court would not permit the entry to operate.

Court.—This is an attempt at severity, which the law will not justify. It is much to be desired that all our mercantile citizens better understood those principles of the marititime laws, which in courts of justice we are bound to follow. Crimes and offences of seamen are rigorously punished; but mariners, with all their too numerous faults, are

Whitton et al. vs. the brig Commerce.

considered by all maritime nations objects of national concern. Their contracts are placed under the cognizance of national courts, bound to proceed by fixed rules, and circumscribed by principles of law. Seamen are deemed the sinews, or more aptly in our ships, called "*the Hands*," of naval power, strength and security. Without the aid of this intrepid and hardy class of men, under national government and direction, commerce might be annihilated. An extended sea coast, convenient for trade and a source of wealth, would be subjected to invasion by foreign foes, and depredations by neighbouring freebooters; and so become a ruinous curse, instead of a public blessing. To say, that without commerce, the nation would have no seamen, is true; but it is as true, that without national protection, in which mariners bear a prominent part, there would be no commerce. The uses made of them in commerce, though of primary importance, are not exclusively regarded. They are encouraged and protected by all the maritime laws, for other and more extensive national purposes, as well as for those in which commercial individuals employ, and profit by, their services. Their frailties are by these laws forgiven; and their offences, so far as these affect contracts, are pardoned on repentance, compensation or offer of amends and return to their duty. Public policy and private justice, as it is fit they should, here move together.

Mariners being again received on board is a waiver and pardon of forfeitures.

In the case before me, it is unnecessary to enquire into any other fact, than that of the mariners having been again voluntarily received on board, by the master, after the alleged forfeiture. This fact is conceded: the master's thus having received

Whitton et al. vs. the brig Commerce.

the mariners on board, is a waiver and pardon of the forfeiture, had the fact, on which that forfeiture is said to have been incurred been ever so clearly established. It does not supercede the principle, and is immaterial, whether the forfeiture attached under a law of the United States,* or in virtue of the general principles of maritime law. Our law only declares when in particular enumerated circumstances forfeiture shall accrue; but it does not furnish any rule for the case now under consideration.

This point has been repeatedly decided in this court, in a great number of instances. The decicions are supported by authorities ancient and modern. In the thirteenth article of the laws of *Oleron*, and twenty-fifth of those of *Wisbuy*,† it will be

Authorities in support of the principle.

* The amount of the forfeiture of wages, has been disputed; and endeavoured to be confined to the wages due from the last port of delivery precedent to the desertion, under the idea that the right to them was vested, and not affected by the subsequent misconduct. But the words of the 5th section of the mariner's act, seems to be too comprehensive for this limitation, "*He shall forfeit all the wages due to him.*" The wages for the section of the voyage unfinished, are *not due* until it is completed, though payments *pro rata* are often decreed, when casualties prevent the seaman from fulfilling his contract, or the master by voluntary discharge, or dismission for lawful cause, warrants a discretionary construction, by interrupting the progress of the agreement. If seamen commit faults so gross, they subject themselves, by their own acts, to all consequences.

† The laws of *Wisbuy* were as famous in, and influential over, all the northern maritime countries of *Europe*, as were those of *Rhodes*, the *Consolato del Mare*, or *Roll of Oleron*, in the scenes of their respective operations. These laws are ancient, but posterior to those of *Oleron*, though the commerce of the northern nations who adopted them was extensive, and their

Whitton et al. v. the brig Commerce.

seen that "The master may turn off a mariner for a lawful cause; but if the mariner compensates for his fault, and the master, nevertheless, refuses to admit him again, the mariner may follow the ship to her destined port, and he shall be paid his wages as much as if he had made the voyage in the same ship. If the master hires a less able seaman, and there happens any damage by it, the master is to make it good." By the law of Oleron (article 13th.) an "offer to make amends and return to duty" amounts to satisfaction.*

Here is a stronger case than that before me. A mariner not simply absenting himself without cause,

hardy enterprizes celebrated long before their promulgation. The *Swedes* were famed for nautical skill, and superiority in the construction of their ships, in the time of the Romans. *Wisbuy* was a city in *Gothland*, in the *Swedish* dominions, once a mart the most flourishing in *Europe*; it is now a ruinous monument of abject and deplorable decay. Its *laws* yet remain in extensive credit and operation, thus long after its commercial importance is blotted out. It affords another lesson of humility, written for the instruction, and monitory to the cupidity and pride, of man.

* See note in the case of a *ship's steward*. In certain cases *no amends can be made*; and an unqualified *rejection* of the mariner, liable to no obligation to receive him again, has been held legal.

In all the cases (and I have had many) of seamen discharged in foreign ports for lawful causes I have enjoined on the masters, (as directory to their future conduct) the necessity of payment to the time of discharge; to enable the seamen to subsist, and return home. Since the law of the U. States expressly directing masters to bring home every member of their crew (in a capacity to return), I have without examination, left this law to its own operation; never having had a judicial opportunity of giving any opinion upon it.

Whitton et al. v. the ship Commerce

but turned off for a lawful cause, must be received again.

From other authorities it appears that the mariner should "repent and make an offer of satisfaction and return to duty, in due time;" that is, before the master has hired another equally able seaman, in his place, or otherwise fairly rendered it impracticable without injury to the owner, to receive him again. And on this ground it has been contended, that where the fault has incurred actual forfeiture of wages, the master is not compellable, though he may consent to receive the mariner again. I think he is bound to receive the mariner, on the terms before stated. The consent and agreement to receive him, is the strongest evidence of satisfaction given, or not insisted on. This consent and agreement to continue his services, is in contemplation of law, a complete waiver and forgiveness of all offences and faults which would have interrupted or destroyed the contract. But all demands for damages and contributions for losses, which warrant deductions from amount of wages, are unextinguished. Embezzlement, frauds, wilful negligences, and other misconduct, chargeable against the *quantum* demanded, remain open for enquiry and compensation.

Mariners repent, and tender their services and amends in time.

When this is done, master is bound to receive him.

But all demands for damages and contributions are unextinguished.

The balance of wages, for the voyage, was decreed, after allowing all legal deductions.

SEAMEN'S WAGES.

John Edwards,
versus
The ship Susan.

1795.

At what period a mariner, at the last port of delivery, may sue for his wages.

THE question in this case was, "When a mariner, at the last port of delivery, is entitled to receive, or sue for his wages?"

Court. It has been a frequent subject of dispute, in this court, sometimes originating in animosity and desire to delay, possibly provoked by some improper conduct of the mariners, but most commonly as it affected costs, at what time a suit can legally be commenced, for wages due at the expiration of the voyage. The controversy always turned upon the construction of the 6th section of the "Act for the government and regulation of seamen."[a] I confess, that it has appeared to me unwarrantable, to contend that the ten days should run from the time of the discharge of the cargo. All laws should receive a construction according to justice, and the principles on which they are predicated. *Qui hæret in littera, hæret in cortice.* The end of the voyage is clearly, in my opinion, the period when the wages, according to the contract, are due. The discharge of the cargo or ballast, is coupled with the end of the voyage in the law, not as part of the contract, or to fix the time, from whence the ten days are to be computed, but because it is a necessary step to enable the mer-

End of the voyage the period, when wages are due.

[a] Laws of the United States, vol. i, page 137.

Edwards vs. the ship Susan.

chant to demand his freight; and the wages ought not to be paid, until this is recoverable, it being the fund, out of which the wages are payable. There cannot be two periods, from which one term of ten days must run. This would be absurd and impossible. It cannot be from the end of the voyage, "*and*" the discharge of the cargo, which must, of course, be after the end of the voyage. An obscurity in terms is therefore involved, which fully justifies a discretionary interpretation. A reasonable time for the collection of freight should be given. The merchant should also have the opportunity afforded of examining the whole cargo, to see whether *embezzlement*, or *damage chargeable on wages*, has occurred. In most cases, ten days after the end of the voyage are sufficient to unlade and collect freight. But it sometimes happens, that where the cargo consists of a great variety of packages, or articles, belonging to a great number of owners, the custom house officers cannot grant permits, within that time. When a number of dry-good ships, added to others, cause a press of business at the custom house, I have perceived the impracticability of delivering the permits, in the time in which, on common occasions, they are issued. Under the latitude given in the words of the section, I have considered myself authorized to enquire into, and decide according to circumstances peculiar to the case. To allow an unreasonable time for discharge, would be as unjust, as it respects the mariner, as it would be to compel the merchant, prematurely to pay. Coals, salt, &c. are frequently retained on board, for a long time; and "*ballast*" is not always discharged. On the contrary, it

Edwards vs. the ship Susan.

sometimes remains on board for more than one voyage. Exercising therefore a discretion, according to circumstances, I have given more or less time, as the evidence justified me. To fix on the time of discharge would be difficult, uncertain, and often unjust. It depends on the industry, the inclination, or the interest of the owner, whether the discharge be accelerated, or unreasonably retarded. I have allowed, at the least, ten days from the end of the voyage; and at the most, fifteen *working* days to unlade. The latter period is given, in the collection law, for this purpose; after the time in which the master is bound to report. Although it has been contended that ten days even after this period, should be allowed, I have not thought it just to extend the interpretation, to a length appearing so unreasonable. It is too great a hardship on seamen, and very injurious to commerce, to delay the payment of wages, and thereby reduce the mariner to distress, as well as prevent his employment in other service. Or, if he is forced by necessity to enter into other employment, it may be at the price of abandoning, or selling for a trifle, the earnings of a precedent voyage. The law was enacted to do justice, and not to impose unnecessary hardships by granting unreasonable indulgences. Although *all* the freight may not be collected within the ten or fifteen days, it can scarcely ever happen that a sufficient sum is not received, in that time, to discharge the demands of the crew.

Wages are payable in *ten days* from the end of the voyage; but in some cases, *fifteen* are allowed for the discharge of the cargo, and payment of wages.

In the case before me, I allow fifteen working days, from the end of the voyage: that is, from the day on which the vessel was made fast to the wharf, and ready to discharge.

Thorne,
versus
White.

1806.

Quarrels and affrays between the master and mariners during the voyage, in what degree they affect claims for wages.

A SEAMAN cited the master, to shew cause why process should not issue against the ship, for wages.

Cause shewn.—That the mariner, who had conducted himself well, in other respects, during the whole voyage had a difference with the captain, in the river Delaware, on the ship's return. A quarrel ensued, and blows passed. The master began the affray, with violence and intemperate passion.

AT the circuit court of the United States, October, 1806, before judges *Washington* and *Peters*, one *Magill*, mate of the brig *Rover*, *Budden*, master, lying, at the time when the offence was said to have been committed, in the *haven of Cape Francois*, was indicted for *murder*, in killing, with malice, &c. his captain. The death ensued a quarrel and affray, originating from intoxication on the part of Budden, and imprudently aggravated by intemperate language and ill-timed resistance on the side of the mate. The fatal *stroke* was given with a very large club, on board the vessel, but the *death* took place on shore. The testimony supported only one of the counts in the indictment; and was substantially as before stated. The defence on the merits was suspended, to take the opinion of the court on the point of jurisdiction. It was alleged, and so ruled by the court, that the *stroke* having been given at *sea*, or in the *haven*, and the death occurring on land, within a foreign territory, the crime was not completed within the jurisdiction of the court, which only

Thorne vs. White.

He threw scalding water, into the seaman's face—provoked resistance first, and afterwards a return of blows, from the seaman. Both parties conducted themselves improperly. The master confined the mariner in the fore-castle, and threatened his life, if he came on deck. A neglect, and refusal to do duty was alleged, which the mariner denied. No order, or demand to do duty, was proved. The resistance to, and attack on, the captain, and the sailor's leaving the ship, before she was unladen, were also insisted on, to repel the claim to wages.

Seamen restrained by confinement and threats, not chargeable with neglect of duty.

Court.—It is unreasonable to insist on the neglect of duty, when the seaman was prevented by confinement and threats. Passes at him, with a

embraced offences "*on the high seas.*" On two of the counts, a nol. pros. was entered, and a verdict of acquittal taken on the third; though some doubts arose whether, if the court had no jurisdiction, the verdict could legally be recorded.

Many authorities from the British books were cited by the prisoner's counsel, to shew, that the place where the *stroke* was given, and that of the *death*, must be within the jurisdiction; and the offence was not complete unless both circumstances concurred. Unless the *stroke* and *death* so concurred, it was not *murder* "*on the high seas.*" The name of the offence is only mentioned in the act of congress; its definition is left to *common law* interpretation—and the authorities cited shew the construction.

On the part of the United States it was contended; that the authorities cited, only applied to the subject of *vicinage*, and were directory of the place of trial, as it respects the summoning the jury. The place of trial is here fixed by our law—to wit, the district of first arrival, or apprehension of the party, and therefore the British authorities are irrelevant and useless. That the British admiralty jurisdiction extended to parts beyond the seas, though the jurisdiction not being *local*, but *personal* over

Thorne vs. White.

drawn sword were made by the captain, at one time, when he attempted to come on deck.

If affrays on board ships, arising from sudden quarrels, are to forfeit wages, forfeitures would be very common indeed.

It is a mistake, frequently entertained by owners and masters of ships, that broils, assaults on, or resistance to masters (produced most commonly by faults on both sides) forfeit wages. Such offences are often improperly called *mutiny* or *revolt;* but they do not amount to this offence, which is defined by our statute, and declared to be a capital crime, and punishable with death. They may be, when the fact justifies the conclusion, evidence of

Their affrays are improperly called *mutiny* or *revolt.*

their subjects, in whatever country they committed offences, cognizance was not taken by their ordinary courts. A court, consisting of the admiral and constable, had cognizance in cases of offences committed by British subjects beyond seas. This court is obsolete by *non user;* but the jurisdiction remains among the powers of admiralty and maritime cognizance; though it is not exercised in modern times. Its existence is only *suspended* not *destroyed.* Civilians (Domat, &c.) have asserted this jurisdiction in other countries.—No case of the actual exercise of this authority was produced.

It was further contended, that the constitution having given to congress, and they having assigned, by the 11th section of the judiciary act, the jurisdiction contended for, the court is legally invested therewith. If it be not within admiralty and maritime jurisdiction (in which no distinction appears in the constitution between civil and criminal cases) congress have no power to legislate in the case; and so such heineous offences must go unpunished, when attended with circumstances like those of the present transaction.

It was replied by the defendant's counsel (Mr. Ingersol), that the 8th section of the act relating to crimes (and not the

Thorne vs. White.

. intent, or overt acts, furnishing ingredients for this crime. But in general, they are merely the intemperate effects of personal animosities, sudden passion, the pride of power, and the sourness of reluctant obedience, or mulish resistance.

Duty of seamen to avoid a master, when ill-tempered or enraged.

It is the duty of seamen to bear even the ill-temper of the master, and to get out of his way, when instances of passion occur.[a] Some of the maritime laws are particular in adjusting how a mariner shall demean himself when the master is enraged, and when he may stand on his defence.

[a] Consulato del mare, 16. Sea laws, 139, 140.

11th section of the judiciary act) is explanatory and decisive, being subsequent to the judiciary act. The only enquiry under this section is, whether *murder* was committed on the "*high seas*," and as the *stroke* and *death* must be in the same place to fix jurisdiction, and both were not, though one was, "*on the high seas*," as they should have been, to warrant the court's taking cognizance in this case, and the *cause is coram non judice*, &c.

The court agreed in the general result, though judge *Peters* gave no opinion as to the general powers included in the words "*admiralty and maritime jurisdiction.*" Judge *Washington* declared that no cognizance was given, over offences committed on land in foreign parts, by these words; but both judges agreed that the *stroke* and *death* must occur on the "*high seas*" to warrant the jurisdiction of this court. It was also agreed by the court—That congress might define the offence, and fix the punishment, if either substantial ingredient happened on the "*high seas.*" They might declare it capital, and punishable as *murder*, if the *stroke*, with malice and intent to kill, was given on the "*high seas*," and the *death*, in consequence, occurred *on land.* And so *vice versâ.*

The defendant was bound over to answer at the next court, to a charge of *assault and battery*, &c. *Dallas*, attorney of the U. S. *Ingersol* and *Jos. Reed*, for the defendant.

SEAMEN'S WAGES.

Thorne vs. White.

Master must not pursue a mariner who avoids him, when enraged.

A master must not pursue (as was done in the case before me) a mariner, who flies from him when enraged. Many of the sea laws are curiously directory in such points.

When a sailor is disobedient or mutinous, the captain is to hold up the *ship's towel* (according to one of the sea laws), for a certain time, within which the mariner is to submit, under the penalties therein prescribed.

Moderate correction of seamen warranted by law.

The law warrants moderate correction of mariners; but, this correction, by the law of *Oleron*,[a] is confined to one stroke of the fist. The laws of *Wisbuy*, among others, are very severe on mariners striking the master; but the cruel punishment therein designated is disused. All these laws regulate the authority of the master; and confine it to moderate correction. When the crime of a sailor is too great for the master's authority to punish (which should be evident on the trial, to justify severe measures) the master and his officers

When the crimes are too great for the master's authority, the seaman must be confined.

[a] Laws of Oleron, art. 12.

In a former case, one *Russel*, a ship master, was charged with *murder*, in killing his cabin boy—the *stroke* was given at sea, the *death* ensued on land. The prisoner was discharged—He was bound over on a charge of *assault and battery*, but the court was divided on the point of jurisdiction, which judge *Peters* asserted, and judge *Chase* denied. He agreed that congress had the power to give the jurisdiction, but they had not vested it in the court. Some doubts arose as to the merger of the lesser offence, in the greater, but no decision was given; and thus *Russel* was discharged, and escaped any farther trial or investigation into his conduct. *Rawle*, attorney for the district. *Lewis*, for the defendant.

Thorne vs. White.

are to seize the criminal, put him in irons, and not take the law into their own hands, but bring him to justice on their return.* But the contract for wages is not affected.

The general rule, that criminal offences do not affect civil contracts, has exceptions.

Although it is laid down as a general rule, that criminal offences, and especially those of inferior grade, do not affect civil contracts, I would not be understood to say, that this rule cannot have exceptions. There may be cases so atrocious as to render the seaman unworthy of further trust, and operate in violation of his contract. It may be dangerous to retain him in service, or to suffer his being at large in the ship. Such cases must always be determined on the special circumstances attached to them. Loss or damage, accruing to the owner or master by any negligence, or crime, may be set off against wages, as in case of any other demand.

Loss or damage, accruing from crime or negligence of a seaman may be set off.

I have generally thought myself warranted to give a latitude of construction to the words "*moderate correction*," where chastisement was salutary

* In a case wherein confinement on board the ship, of two disobedient seamen, appeared to me proper, and indispensable, and where frequent endeavours to reclaim were ineffectually tried, for almost the whole latter section of the return voyage, I held the confinement in irons, so justifiable and necessary for the safety of the ship, that I refused to allow wages for that part of the voyage. The two seamen were influential characters, and atrocious leaders of a rebellious crew. They had not misbehaved on the former part of the voyage, I considered it to be a partial breach of contract, and not a forfeiture *in toto*. These seamen complained, I thought without cause, of high-handed and cruel treatment. I left them to their remedy at *common law*, by action for false imprisonment, or any other mode of redress.

Thorne *vs.* White.

and merited, and in this I have never been overnice. The safety of a ship sometimes depends on promptly checking disobedience, and stimulating exertion. Subordination is peculiarly essential to be enforced, among a class of men whose manners and habits partake of the attributes of the element, on which they are employed. I have never bound over a master for correcting a sailor, unless cruelty was exercised, or improper weapons used. Instances have not been rare in this court (and they have not been overlooked) where the most enormously cruel, and unjustifiable acts of tyranny, and wanton abuses of power, have been exhibited by masters of ships.* Seamen too frequently provoke, and receive, proper correction; but masters should set examples of discretion, and regulate their pas-

Correction necessary, but *cruelty* unwarrantable.

Masters should set examples of discretion and good temper.

* This is by no means mentioned as a general censure, but as an inducement to strict examination into cases likely to develope such incidents. An enumeration of them would not only be shocking to humanity, but offensive to common decency. It would include not only melancholy consequences of sudden and unbridled passion, but calm, deliberate, and cruelly protracted torture, not exceeded by many accounts we have of the rack, or the real or fabled torments of the inquisition. Some of the perpetrators of these enormities have escaped by defect of testimony, owing to witnesses being absent, and some by doubts about jurisdiction. I have had only to determine on the facts, as they related to contracts. When suits at common law were recommended, or the parties left to their own course, the poverty of the victims, or the difficulty of retaining transient witnesses to give evidence, has precluded prosecutions, or suits, entirely; or, where instituted, prevented punishments, or recoveries. Aware of these obstacles to retribution, some have accepted trifling compromises, to which their "poverty and not their will consented."

sions. They must stop at the point, beyond which the law forbids them to pass. The sea laws enjoin on the master a temperate demeanor, and orderly and decent conduct, towards seamen. By several of these laws, he is finable for abusive expressions, or misconduct, towards mariners. He risks the consequences, if he commences a dispute with illegal conduct, and improper behaviour. It is impossible to fix with certainty, the nice tints and colours, which mark the boundaries, between a justifiable command, and an improper exercise of authority; but these accuracies are seldom required. In the case stated, the circumstances are strongly marked. The laws, though often applied to for this purpose, do not encourage or gratify revenge; they only punish for reformation, or example.

Thorne vs. White.

Master must abide consequences, if he begins a dispute with illegal conduct.

When a mariner is incorrigibly disobedient, and will not submit, and offer to do duty and make amends, the master may discharge him. He may correct and confine him on board the ship, or dock him of his provisions. If he refuses, or obstinately neglects, to do duty, for any length of time, he does not perform his contract. Such negligence and disobedience, not temporary and fugacious, but continued, must be set off against his demand, for the period during which they exist. If he is restrained from duty by confinement, he is excused from it by the act of the master; who must, on submission, accept of his services, in most cases.*

An incorrigible seaman may be discharged.

Neglect of duty may be set off.

If confined, he is excused from duty. On submission, his services must be accepted.

* Where seamen have been deemed mutinous or dangerous, and in some instances for affrontive expressions, in others for very trifling offences, masters have thought themselves justified in confining them in prisons, or guard-ships, at foreign

Thorne vs. White.

Must not be twice punished for the same offence.

But the true ground of this case is, that a mariner's contract is not destroyed, by such criminal offences. He is amenable to a criminal prosecution; and liable to fine and punishment. He must not be twice punished for the same offence; first, by forfeiture of wages—secondly, by the fines and

ports, I have not considered this as *legally* justifiable, though some occasions have appeared to render it unavoidable. Some have alleged that the police of the port required it. In the greater number of instances, I have found these punishments to proceed from arbitrary and tyrannical tempers, and, if not entirely unwarranted by the offence yet not defensible in the extremes to which they were extended. Many seamen have perished by diseases and hardships, to which they were subjected in loathsome prisons or infected ships; more have been rendered wretched, and incapable of further service by chronic diseases, or the consequences of acute disorders. I have had to adjust numberless altercations in these cases, about physicians' bills, gaol fees, or costs paid to military or police officers. I generally determined according as the original cause, prompting the punishment, justified or not, or palliated the proceeding. I have always held the step to require strong justificatory proof. But I could not conceive myself warranted, while the seaman was undergoing one punishment to inflict another, by allowing deductions from wages, or pay for the hire of another, especially when repentance, or offer to return to duty was in proof. Some instances have occurred to warrant the measure, and bear out the master in refusing the re-acceptance of service, and totally ejecting the offender from the ship. Some years ago it was not infrequent for masters, at foreign ports, to terrify mariners into an abandonment of their contract, by threats to deliver them to officers of belligerent ships; and some native, and other adopted citizens, were so delivered; others were hired in their stead at low wages, or to work their passages. I checked this practice, by decreeing wages for the voyage, the causes for those unjustifiable threats, or dismission from the ship, commonly appearing unlawful and sordid.

punishments affixed by the sea laws, or the municipal law of our country.

Thorne vs. White.

I have, on sundry former occasions, given my opinion upon the points—when a seaman's contract for the voyage expires, and when he may leave the service of the ship.

This is a summary of my decisions, as well in the case stated, as in many others, similar in circumstances.*

[a] See the case of Edwards, *vs.* the ship Susan, ante page 165.

* I have repeatedly found great difficulties in the way of doing justice to either party, in cases of disobedience or neglect. Sailors have so many peculiar propensities, as well vicious as venial, that it is not easy to arrive, or stop when there, at the true points of either punishment or forgiveness. To punish every fault would be endless; and would, by driving seamen from their own, to seek some other occupation, tend to lay up our ships. I could, therefore, do nothing more satisfactory to myself, than to establish some general principle, and disregard niceties in the application. Without balancing much as to degrees of fault or negligence, I have required proof of *special damage*, in either case. Where damage, or loss, has been sustained, I have ordered retribution; having regard to the circumstances and ability of this class of men. Where neither loss or damage has been in proof, I have overlooked the offence or neglect, where it did not require exemplary notice and punishment. Officers of ships are authorized to use correction for common faults; and can exercise compulsory means, as stimulants to duty. To fix occasional crimes, or faults, as repellants to claims under contracts, would be tantamount to superceding most agreements by mariners. The old sea laws attempted a reformation by mulcts and punishments for enumerated crimes, offences and neglects. These being obsolete in this part of their arrangement, and in some details cruel and inefficacious, are not now practised upon. There can therefore be no accurately marked line; and loss or damage must form the general

SEAMEN'S WAGES.

Thorne vs. White.

Wages ordered to be paid.

It appeared that cross prosecutions, for the criminal offences, were commenced before a magistrate. A receipt in full of all debts, dues, and demands was produced.

The judge stated, such receipts are frequently taken, where quarrels have arisen at sea, to repel prosecutions. They are only *prima facie* evidence, and may be examined into—Seamen are denied their wages often, unless they sign such receipts. But this is illegal, and no such terms ought to be insisted on.

rule. Included in this rule, are all deductions for loss of service, by refusal or voluntary and unnecessary neglect of duty; as well as retributions for malfeazance, misfeazance, or gross negligence. Casual misconduct may be forgiven, or retributed; but inveterate and incorrigible habits of long continuance and dangerous tendency, either entirely annul, or vacate the contract, during their existence, according to circumstances.

Jackson,
versus
White.

1806.

A receipt in full given by a mariner not admitted as conclusive evidence against him.

A RECEIPT from the seaman, purporting to be "*in full of all debts, dues and demands,*" was produced to repel a claim for wages. It had been made use of, to shew an adjustment of a charge for a violent and unjustifiable assault and battery, wantonly and cruelly committed.

Court.—From my own observation, I can truly state that, I have too often seen advantages attempted under colour of such receipts. I am warranted both by common law authorities, and chancery decisions, relative to instruments of much greater solemnity, to say, that although such receipts are in general respectable evidence, yet they are by no means conclusive. *Fraud, duress, misconception, mistake,* in either party, are open to enquiry. If in the settlement of the account any such ingredients appear, or any improper practices, in obtaining the receipt are discovered, the whole matter is enquirable into, and justice must be done, notwithstanding any *prima facie* evidence, arising on the face of such receipts, tending to foreclose investigation.

SEAMEN'S WAGES.

John Whiteman, et al. mariners,
versus
The ship Neptune; Summerl, owner; Taylor, master.

COURT.

1806.

An explanation of the principles relative to receipts given by mariners, which have been adopted by the court.

THE Neptune on her return from St. Domingo for Philadelphia, put into Charleston, South Carolina, in distress. She lay there, fitting and repairing, two months and a few days. The crew, as it was alleged, and appeared by an entry in the log-book, absented themselves for more than forty-eight hours, without leave, and thereby forfeited their wages. But a short time before the vessel's sailing, and after a long absence from duty, in consequence whereof other hands had been employed in the ship's duty and outfit, they were again received on board. It did not appear, though it might have been otherwise, that any terms were made, as conditions of reinstatement under their old contract—nor were the transactions at Charleston minutely investigated. On their arrival at Philadelphia, the seamen claimed full wages; and the owner refused to pay them for the time they had intermitted their services at Charleston, under an idea that they had forfeited their wages to the time of the arrival of the ship there, by desertion. But the owner offered them the alternative, of payment of the whole for the voyage, with the deduction for the time of absence at Charleston, or that they should institute a suit in the district court, and he would abide by the deci-

Whiteman et al. v. the ship Neptune.

sion of that court *as conclusive*. The mariners took time to consider of the proposition, and after several days agreed to it. They were paid their wages, with the deduction mentioned by the owner; and each gave a *receipt in full* for the balance. The clerk who paid them explained to each of them the mode of adjusting the account, and they received, and gave a discharge for the sums severally stated to be due, as the full balance, and without objection; on the contrary they generally acknowledged they had misbehaved themselves at Charleston.

Notwithstanding this discharge, thus deliberately executed, the seamen now claim the wages deducted, and allege, that they had misapprehended their rights, and that the receipt was given under a mistake, as they supposed they had forfeited, their wages when in fact they had not; and if the forfeiture had been incurred at Charleston, it was done away by their being received on board again, without terms, and under the old articles. The receipt, it was said, did not bar their recovery; and decisions of this court were cited to shew that discharges thus given, were only *prima facie* evidence of payment. If fraud or mistake could be shewn, the whole demand was open for investigation. Several cases were cited, to shew the latitude allowed for such enquiries. 1 Powell, on Contracts, 144, and two cases in Peere Wms.

The general principles stated have been rules of decision, in the court, for many years. But every cause must be governed by circumstances peculiar to itself, where these are strong enough to warrant an exception. I abide by the general principles so frequently tested and established, seeing no reason

Whiteman et al. vs. the ship Neptune.

or authority to alter them. If forfeitures are incurred, and the services of the seaman again unconditionally accepted, and not under a *new*, but *the old*, contract, forfeitures are done away, and faults forgiven. But I have always permitted deductions for voluntary absence from duty; and have allowed charges, if they exceeded these deductions, and were inevitable, to be made for hiring others to perform the services, the absent mariners were bound to render. It would be unreasonable that the mariner should gain, and the ship lose, pecuniary advantages, by his voluntary and unfaithful conduct in the abandonment of his duty. When a mariner, under certain circumstances, is withdrawn, by a force he cannot resist, from the performance of his duty, the law continues his right to wages. He must balance this benefit by just compensation and amends, when his services cease by his own conduct, and voluntary dereliction of the duty his contract compells him to fulfill.

The question in this cause is reduced to the point of alleged *mistake;* on which it is endeavoured to repel the bar produced by the receipt in full. Where seamen have been hurried into unjust compliances, by fraud, deception, threats or other improper conduct, palpably imposing, deceiving, overawing, or misleading them, I have disregarded receipts for full payment. But discharges given with due deliberation, and full explanation of circumstances, should not be set aside on light grounds. There will be no end to controversy, if due care is not taken on this subject. It would be highly improper to countenance such *laveering* (to use a sea phrase) as seems to have been practised in this case.

Whiteman et al. vs. the ship Neptune.

If openness and simplicity be characteristic of some, low cunning is not less conspicuous in other sailors. The complainants had a full opportunity of considering and knowing their own rights, and of taking advice. They had the choice of accepting the offer, or proceeding at law, with an assurance of submission to the first decision; and by such submission avoiding the delay and expense of an *appeal*, which to a sailor, eager to receive, and lamentably prone rapidly to spend, his wages, is tantamount to a denial.

Abuses practised in *some* instances by appeals.

Appeals are, too frequently, only productive to rapacious dealers, who buy for trifles, procrastinated claims. It is notorious in this court, that appeals (always desirable to me in doubtful or difficult causes) are too often entered, or threatened, in plain cases, by a defeated, and of course, discontented, party; who, viewing only his own side of the question, easily persuades himself that he is in the right, to force seamen into compliances with litigated deductions. Yet, in the present case, where avowedly no appeal was contemplated, the seamen could not be induced to risk a legal enquiry, which seems now to have been an after-thought; or, if intended, artfully concealed, to obtain from the merchant, as much as he would pay. *Parties* and *counsel* in suits know well, that legal proceedings are attended with no small expense, and not a little uncertainty. The consideration of avoiding litigation, and that under a consciousness of misconduct, weighed with the seamen, against their loss by deduction, from the whole of their claim. Most suitors experience the importance of such considerations, even where no sense of improper behaviour exists. I do not there-

Whiteman et al. *vs.* the ship Neptune.

fore see the *mistake*, said to be made by these mariners, in the light stated by their counsel. I am more certain of the mistake they have gone into, by entering into a controversy, which on both sides appears to have been relinquished. After professing to have acted under misapprehension, it is not to be tolerated in the mariners, that they should take advantage of the misapprehension of the merchant, who paid them, under the idea of putting an end to a dispute, in which he is finally involved. The transactions at Charleston are not in proof; but if the whole subject was before me, and any thing should appear due from the seamen, it is not probable they can refund any sum overpaid. It is not proper that the merchant should be placed, by a deceptious accommodation on the part of the mariners, in a situation to incur the risk.* I dismiss the claim with costs.

* In the 6th section of the mariner's act, the mode of proceeding in cases of seamen's wages, is pointed out. The judge of the district, or, if he resides more than three miles from the place, any judge or justice may proceed in a summary way, and determine a controversy so far as to certify or not, as the case may be, cause for issuing admiralty process. If cause is certified, the suit proceeds in the district court; if not, it precludes farther investigation, and places the party defeated in a situation not to admit of a course to bring the point before a superior tribunal, in the form he wishes. These preliminary enquiries are only where a procedure *in rem*, is contemplated; and are not frequently final. They change into a proceeding *in personam* too often, as the seaman has several remedies. It is then a perplexing continuance of controversy, when parties are embittered and litigious. It is not pleasant for a judge to review his own decision, though the cause may, in form be different. Prejudices may, unperceived by one, of the best inclinations,

steal into the mind, and pride of opinion may have an influence *felt*, without being directly *known*. Parties do not generally submit to the first opinion of either judges or justices, most seldom to those of the latter, of whom there are not many sufficiently acquainted with maritime laws, to have a proper view of the subject. This, as often continues, as closes litigation. Causes are brought into court, after these prefatory enquiries, either to appeal, which may now be done in demands for *fifty dollars*, a sum injuriously too small, to compel compromise, or under a hope of producing an opposite decision. It is at least multiplying chances; which will, at times, operate in suits, as well as in other transactions among mankind. There are some cases *rari nantes in gurgite vasto*, where new evidence, or farther investigation, very properly changes opinion. In the case in question, the cause is now in court.

Whiteman et al. *vs.* the ship Neptune.

SEAMEN'S WAGES.

Relf and others, mariners,
versus
The ship Maria, Pratt and Kintzing, owners.

1805.

Mutinous and rebellious conduct of the mariners, if persisted in, forfeit their right to wages.

THE question principally turned on the case of *Relf*, the owners having settled with the whole, or greater part of the crew, the clomplainant *Relf* excepted.

It appears that the ship had been armed, in the port of *Philadelphia*, with twelve guns; before Congress had passed any law on the subject. There were on board five officers, and forty-two men. The shipping articles were lost; but it appeared in testimony, that the vessel was cleared out for the

The following notes of the decisions of JAMES WINCHESTER, ESQ. *have been received too late for an insertion in an early part of this work, and in connection with cases involving the same points. They, with others which will be included in these reports, will be found worthy of the attention of every lawyer, and will be received as new proofs of the genius and learning of the late judge of the Maryland district.*

1. Seaman's wages are due by the custom of merchants at every delivering port.

2. Wherever freight is earned wages are also earned. And as a consequence of this rule,

3. If the vessel be lost before her arrival at a delivering port the wages are nevertheless earned if the *freight be advanced.*— 2 Sho. 283.

Relf et al. vs. the ship Maria.

"*West Indies*," generally; and the voyage was originally intended to be for *St. Domingo;* and back to *Philadelphia*. In February last, one of the crew, having been frequently before intoxicated, and very much so at that time, was called aft by the mate, then in command, at a port of *St. Domingo*, in possession of the blacks, to be interrogated as to the place where he procured liquor. It appeared that a cask of wine in the hold had been broached. He refused to inform; and the mate called the second officer to bring the irons that the man, *Manuel Peter*, might be shackled, until he gave the information required. The rest of the crew, with *Relf* at their head, then came aft in a body. *Relf* was the leader and spokesman. He declared that no man should be suffered to be put in irons, while he was on board of the ship. The mate desisted, and sent on shore for the captain, who shortly after came on

4. Any agreement of the owners by which the freight of the outward voyage is made to depend on the accomplishment of the inward voyage will not affect the seamen without their *privity*.—Abbot, 276.

5. It is doubtful whether with their privity such a stipulation is not void as to sailors. Edwards, *vs.* Child.—2 Vern. 727.

By the law of the United States, seamen are entitled to one-third part of their wages at every *delivering port*, unless the contrary be stipulated.

It has been usual to insert a clause in sailor's articles "that no wages shall be due or claimed until the return of the ship to her home, and the cargo or ballast delivered."[a]

It is contended by the ship owners, that upon the true construction of this clause seamen lose all claim to wages in the event of a loss on the homeward voyage. On the behalf of the

a See the case of *Giles and others, vs. the brig Cynthia. post.*

Relf et al. vs. the ship Maria.

board, and put *Peter* in charge of two centinels. All the other seamen, on *Peter* being confined, again came aft, *Relf* continuing to be their spokesman, and declared that the man should not be punished, or put in irons while drunk; but they would confine him themselves, until he was sober; and some of them demanded the irons, which were refused. The captain called for arms, though none were brought, but the second mate locked the arm chest, and retained the key. *Relf*, who still was the leader, directed the men to go forward, get their pistols and arm themselves. They went forward, broke up the fore grating, and furnished themselves with handspikes and clubs, but it does not appear they had pistols. One of the men was disinclined to join them, and he was wounded by some of the rest, by a severe blow on the head. They came aft again—Relf told the captain, that *Peter* should

seamen it is insisted, that this clause only applies to wages dependant on the homeward voyage, and does not relate to wages antecedently earned.

On the first view of this clause, the construction which presents itself as most consistent with the law of the United States, and the justice of the case, is, that the parties could only intend it to apply to the *time* and *place* in which the wages should be legally demandable. As such it is a stipulation conformable to maritime usage, and those considerations of general policy which are involved in maritime questions. The owners are protected from libels in foreign ports, and their freight constitutes an additional capital, from whence further profits may arise. The seamen's wages, instead of being dissipated in foreign ports, accumulate for the benefit of their families, and the sailors themselves have additional ties which secure their return to their own country. See the case from Maline, cited in Abbot, 196.

As the latitude of the words used in sailor's articles, autho-

Relf et al. vs. the ship Maria.

be released, or they would take him by force. During this scene, *Peter* escaped from the guard, and mixed with the rest of the crew, with whom he remained during that night. In effect, *Peter* was rescued by *intimidation.* The next morning *Relf* was taken out of the ship, and imprisoned on shore. He remained in prison ten or twelve days, and came, by permission, again into the service of the ship, on shore, by assisting in a store. The mate, wanting him to overhaul the rigging, he came on board, but was unable for three weeks to do duty owing to a venereal complaint. He continued, through all the course of his conduct to be refractory, and shewed no signs of repentance; on the contrary, frequently declared "no person should be put in irons; and that he would knock down the first man that fired on a French privateer." Also, that he would, "if they met with a British frigate, get as many of the

rize this construction, and it is equally favored by justice and policy; it is one to which the court will lean as most consistent with the interest of the parties. But where the clause is so framed as to preclude all construction, and the intent of the parties is plainly expressed, the only question for consideration is the legality of such a stipulation. In most cases, however, it is necessary to decide what is a delivering port, to ascertain whether any wages were earned, to be forfeited by virtue of this claim, supposing it legal and valid. This inquiry is of considerable importance and not without difficulty.

An agreement by seamen that they will claim no wages unless the ship return home and deliver her cargo, is void.

The law of the United States contemplates two species of contract between owners and seamen—1. For a voyage or voyages. 2. For a term or terms of time. The term *voyage* is a technical phrase, and always imports a definitive commencement and end *nomen loci ubi navis oneratur et nomen loci quo navis tendit.* A voyage may terminate upon arrival at a *specified*

Relf et al. vs. the ship Maria.

hands pressed as he could." In consequence of such threats and refractory conduct, he was again imprisoned and finally left on shore. He offered to return in the ship when she was on her way home, but the captain refused; and Relf arrived in this port in another vessel. It appeared that the greater part of the crew were rebellious; and willingly joined in Relf's mutinous attempts; but being considered by the owners as misled, were forgiven and paid.

The claim to wages for the voyage was insisted on, for many alleged reasons. One the most cogent was, that when *Relf* had been again received on board, he was, by accepting a continuance of his services, reinstated in his claims, and pardoned for his offences.

No enquiry into the legality of the voyage.

Judge.—Many observations have been made not applicable to the true point of this case. I will not determine, in this indirect way, any thing res-

port, but it may likewise comprehend a number of ports or places. The right to recover freight, is not therefore on one hand absolute upon the arrival at a port or place of safety during the prosecution of a voyage, nor on the other hand is all claim to freight necessarily lost in consequence of the loss of the vessel before her arrival at *all the ports* contemplated for the voyage. This must depend on the nature of the trade and circumstances of each particular case, as well as the general maritime law. The right of the seamen to wages is so ultimately connected with the right of the owners to freight, that the solution of one, is upon general principles of law, a solution of the other.

By the custom of merchants, freight is due at every delivering port, that is, at every port where an outward cargo shall be delivered in safety, as is well explained in *Luke vs. Lyde*.[a] This

[a] 2 Burrow, 882. 1 Black. 190.

Relf et al. vs. the ship Maria.

pecting the voyage in which this vessel was engaged, as to its lawfulness or impropriety: nor will I decide how far the crew were bound to obey any orders, which might have been given for defence, against attacks by belligerent cruizers. They had no right to suppose, or anticipate, that such orders would be given. When such questions come directly before me, and I find it necessary to decide them, I will meet and determine them, without hesitation, so far as my duty and judgment permit and enable me.

The sole question now is—"Was there or was there not, a lawful cause for ejecting Relf from the ship?"

If Relf has any cause of action for false imprisonment, or cruelty of treatment, for which damages are sought, he must go before another tribunal; so must it be with Manuel Peter, who seems however

explanation requires attention, since it is not the act of delivering the cargo only, but the circumstance of the delivery of the cargo at the specified port, which is a termination of the voyage, *pro hac*. If the parties stipulate, that the vessel shall proceed to A to receive a cargo, and go from thence to B, and unlade the same, and receive on board another, with which to proceed to C.—Upon the arrival and delivery of which last cargo at C, a certain freight shall be paid and not otherwise, the voyage does not terminate until the arrival at C, nor are A and B ports of delivery at which freight is earned. But as this construction arises from the agreement of the owners and freighters, it can in no wise influence the right of the seamen, relatively to whom the agreement has no operation. The owners, as to themselves, are competent to relinquish the benefit of the general rule of law; but as to the seamen who have not relinquished the benefit of the general rule of law, every port where an outward cargo is

Relf et al. *vs.* the ship Maria.

Seamen must not interfere, when officers of ships confine, or punish one of the crew for disorderly conduct.

to have acquiesced; and I hear of no charge from him. Seamen ought to know that it does not lay with them, to interfere between the officers of a ship and any mariner they (the officers or any of them in command) choose to confine, or punish for disorderly conduct. If it is done immoderately, the law affords redress to the party injured. Instead of interfering to prevent, they are bound to assist the master to constrain, imprison, and bring to justice, any disobedient, mutinous and rebellious mariner. When any charge of a criminal nature is alleged, I am, and always have been, ready to examine into it, and pursue the proper measures. The officers of ships are amenable for improper conduct: but if they are not supported in the lawful exercise of their authority, there will be an end of all discipline, and no vessel will with security navigate the ocean. I am always inclined to support their au-

unloaded is as to them a port of delivery, and wages to that time are earned. The owners would also in such case have been entitled to freight, if it had not been for their agreement; and the general rule of law operates in favour of the seamen: they are in no wise affected, if the loss of the freight results from the agreement, or the *fault of the owner*.

In an agreement, by seamen, that their wages shall depend upon the earning of the freight, conformably to the engagement, with the freighter, there is nothing inconsistent with the provisions of the statute for their regulation and government. It is competent to them to connect their right of wages with the owners right to freight upon a voyage, comprising more than one port. *Quia viaggium, vel navigatio, cum sit nomen juris, ac universale, potest complecti plura itinera explenda tàm in itu, quàm in reditu, pro oneratione, et respectivè exoneratione mercium, quas navis, plurimorum, ac varii generis defert in pluribus emporiis vel locis facienda.* 2 Emer. 19. Cassaregis disc. 67, n. 28.

Relf et al. vs. the ship Maria.

thority, though I have been too frequently called on to protect seamen against their oppression. A case in Espinasse, determined in the King's Bench, in England, is produced to shew that a seaman is justifiable in leaving a ship, if obliged so to do, by continued cruelty and oppression. I have, under the clear and direct injunctions of the maritime laws, and in the spirit of that case, often compelled the payment of wages for the voyage, when such circumstances were in proof. But it does not apply in this case. I am of opinion here, that the captain was justifiable in discharging the mariner Relf, and refusing to receive him on board again. It is true that a mariner having committed a fault, and repenting, must be again received on board, on ten-

When seamen are compelled to leave the ship by cruelty and oppression, wages are recoverable, and have been decreed in this court.

The admission of the validity of this sort of agreement is predicated upon the fairness of the transaction, and a full and fair disclosure, by the owners, to the seamen.

It may also happen that, from the *usage of trade*, seamen's wages should not be considered as earned until the vessel return home. In France there is a trade denominated *la caravane*, which is a multiplicity of little voyages, which a captain makes, in the course of his navigation. These divers little voyages, taken cumulatively, form but one single and principal voyage; the freight gained in the course of the caravane defray the expenses of the navigation, and the nett proceeds on the return home are divided amongst the interested. This exception founded on particular usage, strongly confirms the general rule.

The legality of even this sort of agreement derogating from the general maritime law was denied in the case of *Edwards vs. Child.* 2 Vern. 727, in which it is said a similar decision was made by *Lord Chief Justice Holt.* It is true, the authority of this case has since been questioned, and may be considered as overruled, so far as it restrains agreements by which wages are

Relf et al. vs. the ship Maria.

Forfeitures by seamen, to what they extend.

der of amends. These amends cannot exceed what the law contemplates to be forfeited, where forfeiture is inflicted, *i. e.* his wages and property on board. Beyond these a sailor has nothing, *Lex non cogit ad impossibilia.* If he offers *himself*, or returns to duty, it must be on tender of reasonable amends. If he be received on the motion of the captain, or without terms, he is reinstated in his claims, and pardoned for his offences. But in every experiment, *Relf* shewed every sign of a continued, refractory, dangerous and mutinous temper; and not one of repentance and amendment; he was therefore lawfully discharged;—the safety and peace of the ship required it. It was in the option of the captain to forgive other offenders, and continue to reject

Master forgiving some, has no operation as to others.

made to depend on the earning freight, agreeably to the contract of affreightment, but no farther; for the very ground on which its authority is denied, is the fact which appeared in the cause, that the seamen had received their share of the imprest money, which was all that had been received by the ship owners or captain.

To decide upon the validity of a clause by which wages are forfeited to the owners although the freight has been received by them, let us enquire into the reasons by which the general maritime law is supported, and the nature of the relationship between the owners and mariners.

Wages are not due where the vessel is wrecked, or freight not earned or received. The right to wages is made to depend upon the completion of the voyage for securing the fidelity of the seamen; their interest is connected with their duty, and the vessel and freight become specifically bound for the payment of their wages. Public interest also requires that the fate of the seamen should be connected with that of the vessel.

The contract of the sailors is a species of co-partnership between them and the owners. If all is lost, the sailors loose

the services of *Relf;* and to refuse payment of wages after the time of his being ejected from the duty of the ship. The wages due before that time must be paid, deducting any payments or legal *set off*, claimed by the captain or owners. This is not a forfeiture of all wages or property of the sailor on board, but a legal cause to refuse payment after his discharge, though the claim is for the wages during the voyage, which I am in the habit of decreeing, where no lawful cause for discharge appears. There are authorities which go the length of forfeiting all wages due, in very aggravated cases, where no compromise or re-acceptance of service has occurred. In the case before me I should not have hesitated to determine that *Relf* was forgiven and reinstated in

Relf et al. vs. the ship Maria.

their wages; but if all is not lost, that which remains of ship and freight, is a common property pledged for the payment of wages. Freight gained and put on shore in the course of the voyage, is saved from a subsequent shipwreck. It goes into the common stock; but, like the savings from a wreck, is to the last nail or cable, hypothecated to the wages. Even after an abandonment to underwriters, it is still pledged in their hands to the sailors. So also in the case of capture and re-capture, because the ship on her arrival was entitled to freight; the wages were adjudged payable by Lord Eldon. Abbot, 196.

The freight thus earned and received, constitutes a common stock, and in the hands of the owners is a trust fund to be accounted for to those whose industry produced it. A clause by which it shall be stipulated that he who bears the labour and hazard of acquiring this common stock, shall bear all the loss, and not participate even in the wreck of profit, is not consistent with any just notion of co-partnership or common interest. It is wholly incompatible, therefore, with every idea of a trust, to permit one of the parties to eat up the whole estate, and as an agreement to grant or cede it, is destitute of all actual, as well as moral or equitable consideration. It is a nude pact.

Relf et al. vs. the ship Maria.

his claims, by being received on board after his first atrocious misbehaviour. But his subsequent continuance in the rebellious and highly dangerous spirit which prompted his former misconduct, evidences his not having returned to the ship on the terms the law requires, to wit, *repentance* and *amendment*. Whatever effect the re-acceptance of service may have to the time he re-entered on board, the subsequent misbehaviour evidences the *mala mens*, and justifies his expulsion from the ship.

It is, in its very nature, fraudulent as to one of the parties; and with a view to public policy *equally* reprehensible from its tendency to separate the interest from the duty of sailors, and induce them to repair by embezzlement the loss which such an agreement subjects them to. I am therefore of opinion, that the only legal effect of such a stipulation is to preclude the seamen from libelling in foreign ports, until the vessel return, or the voyage be ended; that it is invalid to produce a forfeiture of wages; and that upon the solid principles of law and policy, freight must always be considered the mother of wages, and, notwithstanding any agreement to the contrary, where the former is earned, the latter must be paid.

SEAMEN'S WAGES.

Willendson,
versus,
The Försöket.

1801.

Practice of the court as to foreign seaman.

THE claimant, a foreign seaman, and one of the crew of a *Danish* ship, belonging to *Altona*, cited the master on a claim for wages. Although bound by the articles to return to *Altona*, the seaman alleged a discharge at *Philadelphia*. The captain denied the discharge, and charged the mariner with desertion, for more than twenty-four hours, which, by the *Danish* laws, forfeited wages. He had refused to admit the seaman into the ship, and the sailor staid on shore at lodgings for a considerable time: there were faults on both sides; but the master now offered to take him again on board, on his promise of good behaviour in future, and to forgive all past offences.

It was insisted, that this was a case in which the court ought to interfere, the contract being at an end, by the alleged discharge, and the sailor, in a *Danish* court, would not have the benefit of the proof of which he was here possessed, to repel the charge of desertion, and support his alleged discharge.

Rule of the court, not to take cognizance of disputes between masters and crews of foreign ships, except in special cases.

Judge.—It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships. I have commonly referred them to their own courts. In some very peculiar cases, I have afforded the seamen assistance, to pro-

Willendson v. The Försöket.

tect them against oppression and injustice; and in cases where the voyage was broken up, or ended here, I have compelled the payment of wages. Masters too have always been assisted in recovering deserters, and reducing to obedience perverse and rebellious mariners; these must be restored only to the ship from which they abscond. Under pretext of carrying home deserting seamen, attempts have been made to increase the force, by adding to the numbers, of an armed belligerent ship. Neither assistance or permission should be afforded for this purpose in a neutral territory. In the case now before me, I see no cause to warrant my taking cognizance. It is the duty of the master to return the seaman to his own country. This he offers to do.—It is my duty, from motives of justice, and reciprocal policy, to discourage foreign seamen under engagements to perform their voyage, from breaking their contracts, with any views of obtaining higher wages, or from other unjustifiable motives, quitting the service in which they are engaged. Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country. Whatever ill-humours or misconduct may have prevailed between the parties in this suit, the master now places the matter on a reasonable ground. He must give the sailor a certificate of forgiveness of past offences, to avail him in his own country. If he takes the seaman on board, and there shall appear no deception in the present offer, I shall not further interfere, but dismiss the suit. If any difference should hereafter arise, it must be settled by a *Danish* tribunal.

Duty of the master to carry home his crew.

Master ordered to give the seaman a certificate of forgiveness, and receive him on board.

SEAMEN'S WAGES.

It was stipulated on the part of the captain, by authority from the Danish consul, that the master should *bona fide* comply with his engagement, and pay the sailor's debt for boarding, to be deducted out of his wages.

Willendson vs. The Försöket.

Reuben Knap and others,
versus
The brig Eliza and Sarah.

1802.

The mate and two hands were sent from the ship on shore, with the boat. One of the hands was detached on the business of the ship, from the boat. The mate first, and then the other seaman, left the boat; and it was stolen. The sailor detached is not responsible, but the whole is chargeable to the mate and the negligent seaman.

THE mate, with two hands, were sent from the ship on a special mission, in the boat. The mate detached one of the hands from the boat lying at the quay, on the business of the ship. He, the mate, and the other seaman, ought to have taken care and charge of the boat: but he first, and then the seaman, left the boat, on their own affairs. The boat was stolen.

Judge.—The sailor detached is not responsible. The loss must fall on the mate, and the other negligent seaman. Sailors taken by pirates or enemies, when on special mission, are entitled to wages for the voyage. They have this advantage separate from those in the ship; who lose their wages, if captured in the ship; they must therefore be separated in cases of negligence. The loss must fall on such of the sailors as are in fault; and those in the ship must not partake in retributing the owner. The seaman in the business of the ship, sent from the boat, was the only hand in execution of the mission. The mate and the other seaman abandoned their duty, and must bear all the consequences of their fault and gross negligence.

SEAMEN'S WAGES.

Jones,
versus
The brig Phœnix.

1800.

The entry in the log book is not conclusive evidence, and is to be admitted in support of no circumstances but those stated in the act of Congress. The captain is responsible to the seamen for wages, and therefore not a competent witness in suits for wages by mariners.

THE *log-book* was offered as incontrovertible proof of desertion by a sailor. The captain, in the absence of the mate, was produced to prove the entry, and other facts.

Court.—The *log-book* is, by act of Congress, made legal evidence in proof of desertion, but is not incontrovertible and conclusive. It ought not to be admitted to any fact, but that in which the act of Congress permits it to be evidence. Independent of the plain construction of the act, there are other objections. I have seen attempts to deceive by such entries. In one case it was proved before me, that the captain had made an entry in the log-book, in a blank accidentally left by the mate, of a seaman's desertion. On a careful and clear investigation it was proved that the entry was false in point of fact, and calculated to gratify a malicious, personal antipathy.

I have generally been averse, as I am in this case, to admitting masters of ships as witnesses, in disputes with mariners. I do not believe, or suspect, that masters of ships are liable to any more or peculiar objections, than any other class of citizens. But it so happens, from their situation, that differences and disputes, and consequently strong prejudices, most commonly originate between the master and mariners; and the merchant is governed by the

Jones vs. the brig Phœnix.

master's representation. The master is personally liable for wages, though the seaman may proceed *in rem*, against the ship, or *in personam*, against the owner. It is his interest to throw the responsibility off himself. If the vessel is not valuable enough to discharge the lien, or the owner is in bad circumstances, and the master solvent, he must pay the debt. Instances have not been wanting in this court where unjustifiable endeavours have been made, by masters, to charge the ship with seaman's wages. In some cases, where funds had been furnished and misapplied; in others, to secure themselves. But suppose the master's testimony given in a proceeding *in rem*, and a decree on the merits against the demand, the success of the seaman in a prosecution *in personam* thereafter, if their circumstances permitted further proceeding, would be hopeless. I would not be understood, so to apply particular instances, as to affect general character or principles, but a practice liable to great abuses, ought to be avoided, and other testimony may be procured. The law removes from testimony, persons even remotely interested; especially where their testimony is not the only proof which can be obtained. Having, on the admiralty side of this court, to judge of both competency and credit, I wish to avoid exposing myself to the painful task, of rejecting testimony for want of credit. Although I might not be often placed in this predicament, yet such a situation might occur. The line between competency and credit is often imperceptible, and difficult to draw.

SEAMEN'S WAGES.

Giles and others, mariners,
versus
The brig Cynthia.

1801.

The seamen shipped for a trading voyage, and the vessel was wrecked on her passage to Jamaica from Honduras. Their claim for wages was opposed on the ground that Honduras was not a port of delivery, and that the freight to be earned depended on the arrival of the vessel at Jamaica.

AN American vessel had shipped her hands in Philadelphia, for what is called a trading voyage, having as usual cleared out for the "West Indies" or elsewhere, and to return to Philadelphia. She went to several ports, and finally was wrecked on her way to Jamaica from the Spanish continental possessions, after having been at a port which was at first alleged not to be a port of entry, or place of delivery of a cargo. But it turned out that a regular custom-house was there established, and the ship there paid port charges, and passed through the usual forms. The object of the last voyage was to load with woods, and other productions of that coast. The only question before me was—How far the demand of the seamen should extend? The wages were claimed to the time of the loss of the vessel, as it was said, enough had been saved to pay them. The owners and captain alleged, that all the wages were lost with the wreck. They denied that the port on the *Spanish main* was a port of delivery, though it appeared that some goods, part of the cargo, or captain's adventure, he being a part owner, which were not saleable at *Jamaica*, had been carried to the main, and at this port disposed of.

Giles et al. *vs.* the brig Cynthia.

Newfoundland case.

The case of *Hernaman vs. Bawdent*,[a] was relied on to shew that it was an entire voyage, though some small matters had been delivered at the Spanish port. It was insisted on in argument, that this was no more a delivering port than *Newfoundland*, which is settled by the British case not to be so. And a voyage for woods, &c. on the Spanish coast, is in its consequences as to wages, the same as one for fish to *Newfoundland*. *Where no cargo is delivered, no freight is earned;* and no wages can be payable, where no freight is earned, as the latter is the fund to discharge the former. Vessels go with salt and casks to *Newfoundland*, which *gradatim*, as the fish are caught, are sent on shore, and of course delivered, to cure and enclose them. No more was done in the present case, than to put on shore some provisions, though these were disposed of, to furnish means for the progress of the ship.

Court.—There can be no doubt of the principle that wages are due to seamen in cases of capture or wreck, to the last port of delivery, and for half the time the vessel staid there.—This is settled law in this court. The wages for the interval, after the vessel leaves her last port of delivery to the time of the wreck depend on circumstances. The sailors must assist in saving the ship and goods, or so much thereof as possible, so as to entitle them by way of encouragement, to their wages out of the property saved.[b] But there is no question here to induce me to go into this part of the case minutely. The only point seems to be whether the Spanish port was

Sailors must assist in saving when the ship is wrecked.

[a] 3 Burrow, 1844.

[b] Laws of Oleron, art iii. Les us et coutumes de la mer. 8.

Giles et al. vs. the brig Cynthia.

one of delivery, in legal contemplation, under the circumstances of this case.

I do not see the bearing of the case in 3 *Burrow*, on the present cause. The voyage, in that case, was, in fact, from England to Spain, with a load of fish, to be taken off the banks of Newfoundland; where the ocean, and not a port of delivery, afforded the prey, which was to be caught by the ingenuity and labour of the crew, and which was then to compose the cargo. The salt and casks were the means of preserving and enclosing, after the fishing-lines and tackle had been employed to take and secure the object of the voyage. These (the salt and casks) were used in and about the cargo, and re-shipped in the vessel, with the cargo, of which they were part, on the further prosecution of the voyage. Of course, there had been no delivery, or any contemplated sale or purchase; the voyage being, in its nature and object, entire. Whaling and sealing voyages, and those on coasts where the cargo is to be obtained in a similar way, and not at a port of usual entry, as an article of traffic or purchase,* are to be considered in a simi-

What voyages entire and uninterrupted by sections.

* A ship went from the United States to the N. W. coast, for *furs*, ultimately destined for *Canton*. The seamen shipped *by the freight*; i. e. they were entitled to a certain portion of the freight earned. I held this to be an *entire* voyage, from the *United States to Canton*.

The vessel was not successful in obtaining a full cargo on the coast; having arrived out of season. She called at a port, on her way to *Canton*, where skins had been left by a vessel not fit to proceed. These skins were carried, *on freight*, to *Canton*,

Giles et al. vs. the brig Cynthia.

lar predicament. Possibly a voyage to cut wood, and reclaim it from a state of nature, though on land, which was not here the case, might be compared in its principles, to the case in Burrow.

Freight defined.

I think the force and true meaning of "*freight*" has been much misconceived. It is a technical expression. It does not always imply that it is the *naulum*, *merces*, or *fare*, for the transportation of goods. It is applied to all rewards, hire or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called *freight* (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation.[a] In *Saxon*, from which much of the English language is derived, it is called *fracht*, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail. Many of the commercial terms, as well as the laws and customs of the sea, are derived from the *Saxons*, who were, for a great length of time, the most extensively commercial and nautical people of Europe. There can be no distinction in reason and law, whether this freight, or hire, be actually paid by one, for the use or chartering of the ves-

[a] Ante page 125.

and the cargo thereby completed. I considered the seamen entitled by the contract to a proportion of the whole freight; as well on the furs obtained on the coast, as on those taken in at the intermediate port.

Giles et al. vs. the brig Cynthia.

sel of another; or whether he sends his own vessel for, or with a cargo, to a designated port: which cargo is to be obtained by funds or credit there, or goods, money, or bills, sent in and with the ship. The services of the seamen entitle them to their wages, for that portion of the voyage they have so far completed. A port of destination, it will be seen, is, in this respect, the same as a port of actual delivery. And it matters not that the vessel did not carry thither any goods; but went in ballast. She earns her freight, and the wages are due out of it, as much in legal contemplation, as if she had been fully laden. So is it if she be partially laden, as in this case. Was it ever known that wages were apportioned, according to the quantum of cargo the merchant chooses to ship? Why then should it depend on there being no cargo—but money, bills, or credit, to obtain a cargo, for the further prosecution of her voyage? If a merchant sends the vessel of another for cargo, to a designated port, and obtains none[a], he who hired the ship must pay "*empty for full.*"* Why then should

Port of *destination* and port of *delivery*, the same in legal effect.

[a] Vide Lex Mercatoria. Beawes, 110, 111. 2 Vern. 212.

* Near 40 years ago, in my outset at the bar, I brought *indeb. assumpt.* for money had and received, &c. against the master of a ship, for 90 guineas paid, in advance, by a gentleman, for himself and others, who took the cabin, and agreed for their passages, from an out port of *England* to *Philadelphia*. The day for going on board had been fixed by the parties. The passengers loitered on their route from *London*; and did not arrive at the port appointed until the ship had departed. The case turned out to be as before stated, though conceived by my client to be otherwise, as to the day fixed. Such of the cabin

Giles et al. vs. the brig Cynthia.

the case of the sailor not depend on the same principle, and have the same measure meted to him? both in the case of the vessel sent by the owner, and that of one chartered? And there can be no difference in principle, whether the vessel go empty to a destined port for a cargo, or return under disappointment, without one. Most of the cases, in which the law is settled, for payment of wages to ports of delivery, and for half the time of stay at them, are those of vessels on *India* voyages. Now it is well known, that the inward cargoes, according to the course of trade, both in Europe and in this country especially, are generally obtained with specie, sent for their purchase or credit obtained there. In *China* this is particularly the case—a small portion of cargo is sent to comply with regulations insisted on at Canton, but very inadequate to the purchase of that in return. It appears then clear to me that any port of destination where cargoes are obtained in a course of traffic, either with money, credit, barter, or any means (not such as I have first stated), is a port, technically, and to

East India voyages.

stores as were in preservation, and laid in by the passengers, were returned. I failed in the cause. The passage-money was held to be legally retained, among other reasons, on the principle mentioned in the above case, *i. e.* that freight is earned "*empty for full*," when the disappointment is owing to the misfortune or neglect of the freighter, and no latches are imputable to the master or owner of the ship. In this case it appeared, that the wind, which had been adverse, veered to a point favourable to the ship's departure from the *Downs;* and afforded an opportunity which could not, at that season of the year, be justifiably neglected. She had waited three or four days after that agreed on.

legal intent, of delivery. So are they, though as before-mentioned, disappointments in obtaining cargoes occur, so far as they relate to wages earned by, and payable to mariners. Agreements made with them contrary to this position, whereby they bind themselves not to demand wages, until the return of the vessel to the port of outfit, have been held, even in chancery, void; as may be seen in the case of Edwards, *vs.* Child, 2 Vern. 727.[a] Thus far does the law extend its protection to this principle.

Giles et al. *vs.* the brig Cynthia.

I therefore direct the wages to be paid* to the bay of Honduras, as the last port of delivery, and let the fate of the subsequent wages be determined, by the circumstances attending the wreck; into which I will enquire, if requested so to do.

Wages decreed to Honduras, as a port of delivery. Claim suspended, as to residue.

[a] See the notes of decisions in the Maryland district, by the late judge Winchester, ante page 86.

* Several cases, similar in the leading circumstances, have been determined on the same principles. One, a case of capture and condemnation for unneutral conduct. The cause of the loss of the ship, whether by capture or wreck, has no operation upon the principle. In some of the causes, cargoes were obtained in whole or in part; in others, disappointments occurred. It was probable that in all the cases, an illicit trade had been carried on or attempted, but no objections were made on this account.

SEAMEN'S WAGES.

Thompson, a mariner,
versus
The ship Philadelphia.

1805.

Wages withheld by the owner of the ship in consequence of the mariner not having rendered himself on board at the hour appointed in the articles.

A SUM of money, said to be due to a seaman for wages, was withheld as a penalty for not rendering himself on board, agreeably to act of congress, at the hour appointed. A seaman, one of the crew, who was involved with the present complainant, in a controversy with the owners, by an entry in the log-book, for neglect to render himself on board, was offered as a witness by the complainant's counsel. The entry in the log-book was insisted on by the owner of the ship, as incontrovertible evidence.

Court. At first I thought the witness should be rejected, as one concerned in interest on the same points, agreeably to the law, as laid down in Strange and other books of authority. But as it is stated, that special circumstances attend the case of the complainant, distinguishing it from that of others, I admit the witness. As to the entry in the log-book, it is only *prima facie* evidence.

Wages decreed, on proof of special indulgence to the mariner.

The witness proving an indulgence given to the seaman by the captain, beyond the hour set down on the articles, wages in full decreed to be paid.

Time given beyond 15 days, on special circumstances, for unlading.

In this case, although the ship had ended her voyage more than fifteen days, yet it having been alleged and not denied, that due diligence had been used, but the vessel could not be unloaded, I give further time for payment.

SEAMEN'S WAGES.

Thompson vs. the ship Philadelphia.

Where seamen *may* be admitted witnesses for each other; and *where not*.

On the point of admitting seamen to be witnesses for each other, it is settled here, that one seaman cannot be a witness for another, if the witness and the party have a common interest in the point in contest. If the question be the loss of the ship —embezzlement equally affecting the whole crew —negligence, misfeazance, or malfeazance, to which all must contribute in damages, one of the crew cannot be admitted a witness for another. But where special circumstances distinguish cases —where one having made a similar contract with the other, the breach or performance whereof may happen without affecting the other—where special indulgences are given to one, though not to the rest, a seaman may be a witness for another. Where seamen are involved in similar breaches of contract, though the agreement of each is separate and independent, I hear them with caution. But this affects credit, not competency.

Jameson, a mariner,
versus
The ship Regulus.

1800.

Seaman shipped without signing articles. Question, Whether subject to penalties and forfeitures?

He must be paid according to act of congress, but he is entitled to all benefits and subject to all forfeitures prescribed by the maritime law.

A SEAMAN shipped without signing articles. It was insisted, that he should be subject to no *penalties* or *forfeitures;* being exempted by the words of the first section of the act of congress, "for the government and regulation of seamen in the merchants' service."

Court. This point has been determined several years ago, in this court. If a seaman ships, and performs his contract, *though verbal,* he must be paid, at the highest rate of wages, given at the port of shipment, within three months next precedent. He is subject to all the forfeitures imposed, and rules fixed, by the maritime law, which is part of the common law. It must have been perceived by the framers of our law, that the general maritime law applied to this case; and that nothing was deficient, but the mode of estimating services. It was fixed at the highest rate, that masters might be more on their guard, and see that the articles were executed, and thereby avoid the payment of the highest wages to ordinary seamen. Our statute does little more than re-enact several of the old maritime rules. It considers the mariner, not under written or printed articles, a stranger to its provisions, except that which fixes the compensation. For the rest, he is excluded.

Jameson vs. the ship Regulus.

When the statute and common law concur, the common law shall be preferred.[a] Though a statute lays a penalty on an offence prohibited at common law, an indictment still lies, at common law;[b] and if the offence be at common law, and also prohibited by statute, it stands as an indictment at common law, if it does not conclude *contra forman statuti.*[c] These authorities are only mentioned to shew, that though a statute is made on the same subject, the common law is not abolished, but is of higher authority, when both concur.

The seaman not under articles, partakes in none of the regulations,* nor is he subject to the penalties

[a] Ld. Raym. Rep. 7.—[b] 2 Hawk. 212.—[c] Crow. Cir. Com. 123.

* This must not be understood so as to exclude the mariner from the benefits allowed generally by the act to "*the crew;*" of which he is as much *one*, as those signing the articles. He is said in the act, not to be "*bound by the regulations*"—that is —the regulations operating personally, and in the manner therein prescribed, on the articled seamen. But it has been held and decided in this court, that, as one of "*the crew,*" he is entitled to the general benefits necessary for the safety, health, and subsistence of all "*the crew.*" He shall be supplied with medicines, paid his wages, and be retributed for short allowance of provisions, especially if wages are "*agreed on,*" which often happens, though the actual signing of articles be neglected. In the case of *short allowance*, of provisions, the terms "*wages agreed on,*" are only introduced to designate *quantum.* And this may be done, by referring to any verbal agreement,* or to the "highest price or wages given." *Id certum est, quod cer-*

* It has been contended, that a verbal agreement for less than the "highest wages," should not prevail against the positive injunction of the act, that un-articled seamen shall be paid at *the highest rate.* I have been of opinion that the agreement of the parties, though verbal, superseded this provision of the law.

Jameson vs. the ship Regulus.

or forfeitures, *directed therein.* "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained *in this act.*"[a] Hereby, properly excluding, one whose contract is not made under the act; and of course making that law no part of the terms of his agreement. But he is not out-lawed, and left without any control: he is, on the contrary, governed by the laws existing independent of our act; and is precisely in the situation he would have been, if our law had never been made. If the statute had in express words abolished the common law, and made contrary provisions, this doctrine would not apply. But this is not the question in the present case.

The mariner is therefore subject to all penalties and forfeitures, incurred under the maritime laws pre-existent to the act of congress, and, where not contradicted, now in being, and concurrent therewith; though the master is subject to a penalty, for shipping the mariner, without his signing the ship's articles.

[a] Act for the regulation of Seamen, section 1.

tum reddi protest. The *seaman* may not "*be bound*" by the "*regulations*" for the "*government*" of mariners, exactly as prescribed by the act, yet it does not follow that the *owners* and *master* are not "*bound*" to provide alike, for each of "*the crew.*" It has been doubted whether a seaman, not having signed the articles, is included in the provisions of the 3d section, relative to ships not sea-worthy. This seems, in terms, to contemplate only articled seamen; because, when designating the penalty on a refusal to proceed, the mariner is to be imprisoned "until he shall have paid double the sum advanced to him, at the time *of subscribing the contract for the voyage.*"

SEAMEN'S WAGES.

Daniel Johnson,
versus
Joseph Sims, owner of the brigantine Lady Walterstorff.

THE libellant claimed wages as a mariner on board the brigantine *Lady Walterstorff.**

Construction of an agreement in the shipping articles that no wages shall be paid to the seamen until the return of the vessel to the port of outfit.

The vessel sailed from *Philadelphia* for *Surinam*, but was prevented from entering her port of destination, it being blockaded. She proceeded to *Demarara*, and unloaded a great part of her cargo. With the residue she was returning to the port of *Philadelphia*, and was captured by the French. The libellant signed articles to go a voyage to "*Surinam* and at and from thence back to the port of *Philadelphia*, or to any port in *Europe*, &c. In these articles it was agreed, "that no officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above mentioned port of discharge in *Philadelphia*."

It appeared that the articles were read to the libellant, who was left to put his own interpretation upon them; though the captain said, he understood them so, that if the ship did not arrive in *Philadelphia*, no wages were to be paid. What was the understanding of the mariner on this subject,

* When this and several other cases were determined, capture by the French and condemnation were synonymous. The one and the other, in effect, were the same.

Johnson vs. the brigantine Lady Walterstorff.

did not appear. It was therefore left to be gathered from the clause, how far it affected his present claim.

It was contended, on the one part, that the mariner was entitled to his wages to the port of delivery at *Demarara*, and for half the time the ship stayed there—That this is settled law in common cases. But the question made on the other side was,—Whether the clause before recited did not take this out of the common cases, and defeat his claim entirely, as the ship never arrived at *Philadelphia*.

The agreements of parties to control the law must be clear and explicit.

Court.—There is no doubt but that the agreement of parties may control the general operation of law. But this agreement must be clear, and incapable of doubtful import. I will never decree a forfeiture, or loss of wages, unless the law or agreement of parties is fully and clearly, both in expression and import, against the claim.

It does not appear in this case that more than the usual wages were agreed to be paid to the mariner, though the clause in question is out of the common course.

There is no dispute, in this cause about the wages accruing after the vessel departed from *Demarara*. The capture occasioned the loss to the mariner of such wages.

In the act of congress "For the Government and Regulation of Seamen in the Merchant's service," printed at large on the back of the articles signed by the mariner, the libellant in this cause, § 6. it is enacted—"that every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they

Laws of the United States, vol. i, p. 134

belong, one-third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, *unless the contrary be expressly stipulated in the contract*," Johnson v. the brigantine Lady Walterstorff.

In this case, *it is stipulated to the contrary:* but I am of opinion that the clause in the articles relied on by the counsel for the owner of the ship, ought not to be extended farther than a stipulation, not to be entitled to demand or to receive the wages, or any part thereof, at the foreign port of delivery. The amount of the wages due at *Demarara*, must be considered to be, *debitum in presenti, solvendum in futuro.* The stipulation does not alter the substance of the contract,[a] or the operation of law, but merely as it regards the *time* and *place* of payment.

I do not consider the agreement, not to demand or receive wages until the arrival of the ship at *Philadelphia*, to be a contract that the risk shall be insured, or the arrival guaranteed, by the mariner. It is an agreement that such wages, as were legally due at a foreign port, should be paid only in *Philadelphia.* The period of payment was to be fixed by the arrival and discharge at *Philadelphia*, in a common course of events. But the arrival at that place was prevented by a casualty, not under the control of the mariner. It is no matter whether this casualty had been wreck, or what it was, capture.

I am, under all the circumstances of this case, of opinion, and I adjudge, order and decree, that the owner of the brigantine *Lady Walterstorff*, pay to the libellant the wages due at the port of *Demarara*, Decree for wages to the last port of delivery, and for half the time the vessel staid there.

[a] See 2 Vern. 727.

Johnson vs. the brigantine Lady Walterstorff.

and for half the time the vessel stayed at that port. And I do order and direct, that the clerk of this court adjust and report the *quantum* of wages, to the end that the amount of wages so adjusted and reported, be paid to the mariner, the libellant in this cause, with costs.

SEAMEN'S WAGES.

Sundry mariners,
versus
The ship Washington; Ketland, owner; Williamson, master.

1801.

A part of the wages of the seamen withheld to indemnify the owners against damages, claimed in a suit depending at common law, ordered to be paid.

THE claim of the seamen consisted of two parts—

First. A demand for six dollars, each, retained by the owner, to indemnify him against a suit brought against the master, in a common law court, for running down and damaging a schooner at sea. This suit is pending and undetermined, and the captain agreed that he meant to contend the point; alleging that no negligence or misconduct on his part, or that of the crew, occasioned the accident.

Court. It is clear to me, and must be well known to the counsel of the respondent, that the detainer of the six dollars out of each of the seamen's wages, is illegal. No contribution can legally be called for from them, until a recovery is had against the master, and the *quantum* ascertained. It is yet doubtful whether any damages will be recovered, for the accident mentioned. The master is satisfied that none are justly due. To withhold the payment under a bare possibility, is not warranted by law. As to what the merchant deems prudent and safe for himself, such considerations cannot control or destroy contracts. If negligence or malfeazance, on the part of the master and crew, had occasioned the accident, the mariners

Mariners vs. the ship Washington.

must, no doubt, contribute; but the fact and consequences must be legally established, before such contribution can be called for.

This point was given up, and the wages agreed to be paid.

Claim of compensation for short allowance during the voyage.

The second demand was for a large sum, under the act of congress, for payment of additional wages, on account of short allowance, during the greater part of an *East India* voyage home.

Quantity and species of provisions required for an *East India* voyage.

It was agreed that, to satisfy the words of the act of congress (designating what quantity and species of provisions should be on board at the departure of a ship destined across the Atlantic) "and so in proportion for a longer or shorter voyage," there should have been on board, previous to sailing, two hundred and fifty pounds wholesome meat, two hundred and fifty pounds good bread, and one hundred and fifty gallons of water, for each person, of whatever capacity or description, in the ship. The ration established for the navy,* was agreed to be that, by which the allowance of provisions to mariners should be regulated. There

Navy rations the rule by which the allowance to seamen should be determined.

* See act of congress, July 1, 1797, "An act providing a naval armament," section 7, (vol. iv, p. 14,) wherein the naval ration is established.

The *quantum* or description of articles fixed for mariners in merchant ships, was not intended to be specifically according to the various kinds of esculents directed for the navy; but it was declared and agreed, that of such provisions as are ordered to be provided by merchants for their seamen, the quantities of the like kinds, furnished per diem, should be the same with those fixed for the navy. So of equivalents, where the designated species could not be obtained.

SEAMEN'S WAGES.

were eighty-four persons on board—the length of an *India* voyage was agreed to be equal to two and a half voyages from America to an European port.

Mariners vs. the ship Washington.

An *East India* voyage rated as two and a half European voyages.

It appeared that the *Washington* was amply provided, previous to her departure from Philadelphia to India, not only with the requisite quantity for the voyage, of enumerated articles of provisions and water, but with a very considerable excess. In addition, there were flour, rice, and cabin-stores, in abundance. On her return, water was taken in, and provisions, though not of the specified articles, purchased. The passage was uncommonly long. Owing to over-care in the master, in putting the common ship-bread into tight casks, which happened not to be made of seasoned wood, twenty-six casks, out of thirty, were spoiled on the out passage. He therefore, gave bread of a better kind, in less quantities, making out the allowance in ample proportions, with other articles equivalent. At *Batavia*, the bread was saved, and except one biscuit per man, yams, rice and potatoes, were given in lieu thereof. But because the ration was not delivered, in the kind of esculents mentioned in the act of congress, and some precautions taken to ensure a sufficiency of provisions, the mariners now set up this demand.

Court. The only ground for establishing a claim of the nature of the present demand, is a negligence in the master or owner, in not furnishing the ship before her departure from the port, with the quantity and species of provisions and water, required by law. Where these can be procured, no equivalents can be admitted as substitutes. But in ports, where the specific articles of provi-

Where the articles specified in the act of congress can be procured, no substitutes allowed.

Mariners *vs.* the ship Washington.

sions cannot be obtained, it would be unreasonable to suppose, that the spirit and intention of the law, do not permit equivalents, of other good and wholesome esculents, to be substituted and supplied, in place of provisions damaged or consumed. The owner or master is to take the best precautions to procure good and wholesome enumerated articles, which is often difficult in foreign ports. But they are not answerable for accidents happening to them, without negligence on their part. After the requisite quantity and species are taken in (where they can be obtained) the master is the sole judge of their expenditure. He must not wantonly deprive the crew of an ample allowance. It is not his interest, nor does it comport with his own comfort, or the safety of the ship, to produce, by unwarrantable privations, discontents, ill-humour and debility, in the crew. But if the voyage is likely to be uncommonly procrastinated; if provisions are, by accidents, diminished in quantity, he may, justifiably, abridge the usual allowance. There is not the shadow of reason to complain, where other provisions are substituted, for enumerated articles, damaged, consumed, or not to be procured. It appears, in this case, that there is no reasonable or legal ground of complaint. I therefore dismiss this claim.

But otherwise, if they cannot be obtained.

Master the judge of their expenditure.

Causes which excuse the master in abridging the quantity of provisions.

Gardner and others,
versus
The ship New Jersey, Cooper, master.

1806.

MARINERS' wages and claim for short allowance. Also petitions of the master and physician for payment out of *remnants* and *surplus*.

The voyage was from *Philadelphia* to *Canton*, and back to Philadelphia, with liberty to go to other intermediate ports.

A claim of compensation for short allowance.

A suit was commenced for mariner's wages, in which sundry disputes arose, of no general importance. The wages were decreed, and the vessel directed to be sold for their amount, together with a sum adjudged to the seamen for twenty six days short allowance of provisions, at one day's pay to each mariner, for every day full allowance was not served out.

The act of congress does apply to seamen shipped in foreign ports.

It was contended that, with respect to some of the mariners shipped in foreign ports, the voyage should be considered, so far as they were concerned, as commencing at the ports of shipping them respectively. And as the act of congress only contemplated voyages *from* the United States, the case of a seaman engaged in a foreign port was not within its purview. But this objection was overruled for the following reasons.

The voyage was entire, and commenced at *Philadelphia*, and there ended. The intermediate circumstances became engrafted into the entire voyage, and this rode over all subordinate considerations.

Gardner et al. vs. the ship New Jersey.

There could be no subdivisions, or apportionments, except as to the time of service of the respective individuals, which determined the amount severally due to them. Endless confusion and difficulties would arise, from such distinctions among the crew, each of whom participated in the general contract, and had the same rights to any benefits, as they shared in all disadvantages, arising out of that contract. The deficiencies of provisions accrued on the *home passage*, in which all the mariners were alike engaged.

Species, quantity and allowance of provisions, how fixed.

The decision in the case of the *ship Washington*,[a] was taken as the guide to determine the quantity and species of provisions, required on a voyage from *China;* and the *navy ration*, the rule by which the allowance was adjusted. Substitutes for articles enumerated in the law on this subject, were allowed. The live-stock, though legally excluded, was, by consent counted in, and yet there was a large *deficit* on the whole. The payment for the short allowance, at the rate directed by law, was therefore decreed.

The ship was sold by the marshal, under the decree; and the monies arising from the sale, were brought into court. There remained a *surplus* or *remnant*, after payment of all sums adjudged to be paid, and the costs and charges, accruing in the suit, and on the sale.

A claim by the master for sums disbursed by him, and for wages.

A petition of *James Cooper*, the *master*, was presented, stating, that he had expended, during the voyage, for *pilotage*, *mariner's wages*, and other charges necessary for the use of the ship, two hun-

[a] Ante page 220.

dred and fifty seven dollars, which remained unpaid. And that there were due to him, for wages as master, eight hundred and twenty-seven dollars and sixty cents.

Gardner et al. vs. the ship New Jersey.

Another petition from *William Baldwin*, was also presented, stating, that he was employed as *physician* in and for the ship, on her voyage from Philadelphia to Antwerp, Canton, and back to Philadelphia. And that there remained due to him for his services on board, one hundred and sixty-seven dollars.

Claim by a physician for the amount due on a contract with the owners, for services on board.

The petitioners prayed that the sums due to them respectively, should be paid out of the *surplus monies*, remaining in court, after payment of all sums decreed, and the costs and charges thereon.

The claim for payment to the petitioners was insisted on, under the authority of a *dictum* of sir *William Scott*, in the case of the *Favourite*, which it was alleged, justified a payment to the *master*.[a] The justice of his claim was farther enforced, by the reasoning in 2 *Brown's Civil and Adm. Law*, 95, where the *propriety* of the master suing in the admiralty is advocated, though it is admitted not to be practised. *Abbot*, 94, was cited to shew, that money, paid by the master on a foreign voyage, was a *lien* on the ship.

The general doctrine, that whatever court had possession of the *principal*, had power over all *incidents*, was relied on, to support the claim of the *physician*.

Court.—When I first came into this court, I made, in several instances, distribution of *surplus monies*, under the idea, that I had the power so to do,

[a] Rob. Adm. Cases, vol. ii, p. 197. Phila. ed.

Gardner et al. vs. the ship New Jersey.

agreeably to the doctrine now stated, to justify me in granting the prayers of the petitions. But on experience, I found myself involved in many difficulties and mistakes, in the application of this doctrine. It was one among the mass of irregularities I had to encounter, before I established, by frequent decisions, and with much consideration, the general principles which now prevail. I found it best and safest, to fix some *general rules*, applicable to most cases, though at times, some anomalous instances should occur, inducing particular hardships. The rule, by which I have governed myself for several years past, is, that it shall appear, that a sum claimed out of the surplus or remnant, is either *of itself*, or in its origin, a *lien* on the ship, or other thing out of which the monies were produced. This rule is not only justified by the practice of the *civil law*, but in the *English chancery*, and even in their courts of *common law*, wherein they are governed, when the case requires, by the principles of other courts, having concurrent cognizance of the subject matter, either incidental, or in chief. Many authorities may be produced to support this position. In *chancery*, the monies arising from sales of lands, are distributed as liable to the same *trusts* or *liens*, to which the land itself was subjected; and so of the produce of any subject or thing, originating the suit, or matter, under the cognizance or the enquiry of the court. Whensoever the courts of *common law* have occasion to determine questions of admiralty jurisdiction or cognizance, the principles of decisions in the admiralty courts are pursued. Their strict adherence to preferences, given by liens at common law, is invariable. But it is rare indeed, if at all to be dis-

There must be a lien legally and precedently fixed, to entitle claimant to payment out of *remnants* and *surplus*.

covered, that liens on monies or other subjects, are attached by considerations not originally subsisting, or exclusively fixed.

Gardner et al. vs. the ship New Jersey.

With respect to the claim of the master, for sums paid abroad to mariners, or even here, I think, on principle, these, as well as monies advanced in foreign ports for necessaries, supplied to the ship on her voyage, (however it may be at the port of outfit, or where the owners reside) are *liens*, and the ship was *hypothecated* therefor. Claims of *material men*, for supplies afforded to a ship, are within the jurisdiction of the admiralty, and suable there, in *England*, as well as in other states. *Pilotage* is a necessary expenditure on a voyage. If a master pays demands for these claims, he represents the claimants, and the *lien* continues on the monies produced by the sale of the ship.* As to *pilotage*, the master is bound by the laws of *Oleron*, and other maritime laws, to pay it, for the safety of the ship and goods.

Master's claim for disbursements allowed.

Material men.

Master bound to pay pilotage.

In *England* a *shipwright* may sue in the admiralty, for building a ship for navigation on the sea.[a]

Shipwrights may sue in the admiralty.

[a] Rolle Ab. 534.

* Although, *in strictness*, it might be contended that the *lien* was discharged, by payment to those who only held it until satisfaction was made; I have thought myself authorized to give more latitude, from equitable considerations, in such cases, than the inflexibility of rigid legal rules would, perhaps, in general, permit. These rules I venerate too much to take unwarrantable liberties with them. The allowance to the master in this case, was not opposed. He had the power to *hypothecate* the ship for necessaries, in a foreign port; and was under no obligation to advance his own money. Wherever these advances are made, every security for re-payment should be encouraged.

Gardner et al. vs. the ship New Jersey.

and for repairing a ship.[a] But as the laws of this state provide for shipwrights and material men at the port of outfit, and also regulate *domestic pilotage*, and the sums due and recoverable here, on that account I have generally referred parties exhibiting such claims, to the state jurisdictions; wishing to avoid all collisions and conflicts in such cases. I have confined this to *domestic* supplies and *pilotage*. Those furnished, or paid, in foreign ports, or here, on ships on their voyage, and not at a port of outfit, the owners being resident here, I have reimbursed, or distributed, out of surplus monies, where liens or hypothecations have appeared to me to have attached. I have also directed a surplus to be paid over to a *master*, where the owner or his authorized attorney or agent, did not appear. But this has been done with great caution. *Wharfage* has been allowed out of proceeds, as the wharfinger might detain the ship until payment.

Why the district court declines cognizance of outfits here.

Surplus sometimes paid to master as agent of the owner.

Wharfage.

I do not find any precedent or authority to warrant my granting the prayer of the master's petition, in the case before me, for his wages. His contract is clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship. He is the owner's agent, and responsible to him for his acts, particularly those relating to mariners' contracts, and other transactions in the affairs of the ship. If in any thing he has done wrong, the owners may retain; and the contest is cognizable in another jurisdiction. If he is also answerable to those furnishing supplies by his order, and to the officers and mariners of the ship, he is in-

Master not entitled to wages out of surplus.

[a] Cro. Car. 296. Cited in 2 Bac. Ab. 180. 5th edition.

demnified by such claims being attached *as liens* on the ship, or the monies produced on sale, in addition to the owner's responsibility. He has a farther security in the right to collect the freight, and possess the fund out of which wages are payable. So that the law clearly distinguishes his case, as it respects wages, from those usually entitled to *liens*. I have paid out of surplus, the wages due to masters of *Spanish ships*, because the laws of *Spain* entitle them thereto: and I always am regulated, in the affairs of foreign ships, by the laws of the country to which they belong. I could discover no precedent for this in the laws of any other country.

Gardner et al. vs. the ship New Jersey.

Masters of *Spanish* ships paid out of surplus.

The maritime laws of *England*,* existing be-

* The *maritime laws*, when clearly adopted and settled, became part of the English *common law*, which is retained by us to this day, in all cases permitted by the principles of our government. In a former note on this subject, page 112, I have either expressed myself improperly, or there was some mistake in copying. The words (after, "the feudal parts of this law")—"*and such as are*," should be struck out—so that it read, "*the feudal parts of this law inconsistent with the principles*," &c. So it may be said of any other parts of the common law, if such there be. But I do not mean to enter into any controversy, as to what parts, or in what cases, the common law is obligatory and directory in the courts of the United States, having on these subjects often declared my opinion. Whatever difference of sentiment there may exist, as to its *being granted by the people—delegated to the federal courts*—or it being required that so it should be—it must be indisputably known, to all who are well informed, that without the rules and provisions as settled and made by the common law, the courts would be inoperative. The parties having the privilege of suing therein, or those compelled to become suitors there, would find themselves in a destitute and hopeless condition. Proceedings must be new-modelled, and remedies defined and made efficient. Even *crimes*

Gardner et al. *vs.* the ship New Jersey.

fore our revolution, and consistent with our situation, are yet our laws. It is but recently that admiralty cases have been published. We have, therefore, unavoidably, recourse to their common law books, for authorities. These invariably shew, that the master "cannot sue in the admiralty court, for his contract is on the credit of the owners, and not, like that of the mariners, on the credit of the ship."[a] These authorities, as well as the few mari-

[a] 2 Robin. Adm. Cases. 196.

(as to the jurisdiction over which there is the most discontent and controversy) could not be described, prosecuted or punished, according to any other law now extant. Some of the highest, and most of the inferior crimes and offences, are undefined by any law of the United States. For what depends then on any other provision, they may be committed with impunity, if common law designations and definitions, and the forms of process, and modes of proceeding are rejected. We have experience sufficient to convince us of the inefficiency, and often mischief, apparent in attempts to substitute alterations, or supposed amendments, for the rules and principles of the common law. It would be more than human, if it were entirely perfect. If experience and change of circumstances suggest alterations, they are but few. In attempting reform in these, if we shake the whole fabric, it were better to suffer it to remain undisturbed.

In another note on the same case (Thompson et al. *vs.* the ship Catharina) I have been also careless or unfortunate, in expressing myself, on another part of the subject. The two last sentences of the last paragraph of the first note, in page 114, should read thus—"an agreement not to bring a suit to enforce performance of a contract, *if made for a time limited*, is well; but if made posterior to the bond, contract, or agreement, *indefinitely*, it amounts to a *general release*." See Carth. 64. Comber. 123, 4.

time cases published, also point out what parties may sue in admiralty courts.[a] As to the reasonings and opinions of an elementary writer,[b] whatever weight may be attached to them, as *theories* to shew what the law *ought to be*, I think it safest to be guided by *what* it *is*. I have had occasion to discuss, in several cases, the subjects of maritime jurisdiction. It will be found that I have endeavoured to establish it on similar principles, where from necessity I was compelled to reason, without a precedent to direct me. It is certainly founded, for the most part, on the *subject matter*, and not solely on the *place* of making the contract. But I do not wish to wander into theories, where respectable precedents can be found. All these are opposed to this writer's doctrine.

Upon what admiralty jurisdictions are founded.

The authority of *Sir William Scott*, whose opinions I highly respect, where no diplomatic direction gives a bias to his judgment, is more to be depended upon. He seems to hold, that surplus and remnants have been distributed to the master; or rather, that "upon enquiry, no instance has been found, in which a master has been permitted to sue against proceeds in the registry, *except in cases of mere remnants and surplus; and not even then*, if there have been any *adverse interests* opposing it." I have a similar wish to that expressed by *Sir W. Scott*, to aid an unfortunate suitor. In that case, the bottomry creditor alone, appeared as adverse; and his lien reached the remnants and surplus.—So that *Sir W. Scott* was not under the necessity of explaining what he meant by "*adverse interests*,"

[a] See 2 Bac. Ab. 181. 5th ed. and authorities cited.

[b] 2 Brown 95.

Gardner et al. vs. the ship New Jersey.

or whether he distinguished them, by such as were accompanied by *liens*, or *general interests*, without such preference. In the case under consideration, I am given to understand, that there are creditors of insolvent part owners, whose *interests are adverse* to the master's claim; and who certainly deem themselves equally entitled to payment; beside, if the master can obtain his object in this mode, it will establish a precedent for such applications in all future cases, wherein monies arising from sales of ships for wages, or other causes, are ordered into court. Thus a lien will be *created;* and, though not originally attaching *directly*, will be fixed by circuitous and indirect means.

A lien not attaching directly must not be created by indirect means.

I shall continue to adhere to the principles I have endeavoured to establish, not to admit the distribution or payment of surplus, to others than those who originally had *liens*, or legal appropriations, on the object from which the monies in court were raised.

Physician's claim rejected.

From what has been stated it appears, that there is no foundation for the claim of the *physician*. It is true that a court having possession of the *principal*, has power over its *incidents*. But these incidents must rise out of the principal, or be in connexion with it, or flow consequentially from it. Thus, if the original cause arises at sea, and matters happen on land dependant upon it, the admiralty has still jurisdiction. So of goods taken piratically, or as prize, at sea, and brought to land—sails, or other apparel or furniture, taken from a ship under cognizance of the admiralty, and brought to land. So of all questions consequential to that of prize, &c.[a]

What is understood by jurisdiction over incidents.

[a] See authorities cited 2 Bac. Ab. 178. 9, 180.

Thus if claims, or liens, are legally attached to *things*, or monies under the cognizance, or within the jurisdiction of the admiralty, this court has power to decide respecting them. But it does not

Gardner et al. vs the ship New Jersey.

The following decision by the late JAMES WINCHESTER, ESQ. *on some important points of admiralty jurisdiction, will be read with pleasure by every member of the profession of which he was a distinguished ornament.*

Stevens, *versus* The Sandwich, Adams, claimant. } In the District court of the United States for the Maryland district.

THIS libel involves the general doctrine of liens for the building or preparation of ships in port, and the jurisdiction of this court.

Admiralty jurisdiction of the district court.

I shall examine both these preliminary questions before I investigate the facts, or decide the merits of the particular case before the court.

By the judiciary act the district court has *exclusive* original jurisdiction of all *civil* causes of admiralty and maritime cognizance. And it is somewhat remarkable that neither this act, nor the constitution which it follows, limit the jurisdiction in any respect *as to place*. It is bounded only *by the nature* of the causes over which it is to decide. Its jurisdiction will not be better understood than by an inquiry into the original acceptation of *admiralty powers*. Since they will be found to have been *military authority*, and entirely contradistinguished from *civil judicial powers*: and after judicial authority was superinduced, the difference between that which is stiled admiralty, and that which is called maritime jurisdiction is *merely nominal*.

A tribunal similar to the district courts of the United States exists in every civilized country, peculiarly invested with the cognizance of all questions which result from the navigation of the sea, in which foreigners are or may be interested, and which

Gardner et al. vs. the ship New Jersey.

follow, that claims independent of such *things*, or *monies* produced from them, and mere personal demands on their owners, are within the reason of, or entitled to the remedy, prescribed by this principle;

are governed by the law of nations. Hence the authority and binding efficacy which has been generally conceded to the sentences of admiralty courts. But independent of the peculiar jurisdiction which appertains to the special laws by which such courts are bounded and governed, (Zouch Jure Marit. 382.) other powers are added by the laws of the country in which they are established; and the general application of the term *admiralty jurisdiction* to municipal jurisdiction, thus added without a correct discrimination of their sources, renders it extremely difficult to restrain the precise import of the terms *admiralty* and *maritime* causes, as they are used in our constitution and laws. In England the control of their own navy, in France the right of fishery, in Holland the preservation of the dykes and mounds, and in Denmark and Sweden the superintendance of the revenue, are confided to their courts of admiralty—and different as they are in their qualities, and local as they are in their nature, they are alike denominated admiralty causes. The policy, justice or general convenience of the local regulations of commercial states, have been more or less adapted or extended to different countries; and what all adopted, all became equally interested to support. The civil law, the laws of *Rhodes*, and *Oleron*, and the particular municipal regulation of towns and nations bordering on the sea, (see 2 Bac. Abr. 184.) became of course the common rule of decision. In England, where the jealousy of the civil law was most conspicuous, while its authority was openly denied, the principles of equity derived from that code, influenced the decisions of their courts in as great a degree as in countries where it was adopted.

In all of which from the books within my power, I can obtain any legal information, every contest or dispute, *between the owners and mariners, and the owners and builders, or equippers of a ship for navigation on the sea, is of a maritime nature and cognizable in the admiralty.*

and I deem it an exclusion from a distribution, or a claim to a surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution, could not sue in the admiralty for

Gardner et al. vs. the ship New Jersey.

Those who could not originally sue in the admiralty, are excluded from distribution of remnants and surplus.

The statutes 13 and 15, Richard II, have received in England, a construction which must at all times prohibit their extension to this country. The reports of decisions in the courts of that country are perfectly irreconcileable; a latitude of jurisdiction has been allowed by able and liberal judges, which to others, perhaps no less wise or virtuous, were deemed inconsistent with the statute of Richard II; as in the case of a charter party *signed and sealed at land*, it is holden that the admiralty has cognizance because it is a *marine cause*, and seamen's wages, though admitted to be a marine cause, are held not to be cognizable in the admiralty court, if the instrument is sealed, because the admiralty cannot try the deed, Salk. 31. Thus, in one case, the reason why a cause is held to be cognizable in the admiralty court, is the foundation for refusing it in another. And in another, to wit, a dispute between part owners whether a ship shall be sent to sea? is allowed to be cognizable, although the whole dispute arises on land, and is only collateral to a marine cause. I mention these cases to shew that no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes, or the works of jurists who have written on the general subject.

Within the cognizance of this jurisdiction are all affairs relating to vessels of trade, and the owners thereof, as such; and all matters which concern owners, proprietors of *ships* as *such* —all causes of pawning, hypothecating or pledging of the ship or vessel itself, or any part thereof, at sea, and whatever is of a maritime nature, either by way of navigation upon the seas, or negociation at or beyond the sea, in the way of marine trade or commerce—also the nautic right which maritime persons have in ships, their tackle, &c. likewise all causes of out-riggers, furnishers, owners, and part owners of ships, as such see also Beawes L. M. 282, cites Wood's Inst. 813. It is allowed by the

Gardner et al. vs. the ship New Jersey.

their demands. There is no doubt that the *physician* has no capacity, as such, to bring a suit in the admiralty court for his demand, which is merely *personal*, on the owner, or owners of the ship.

common lawyers and civilians, that the admiralty has cognizance of seamen's wages and contracts and debts for making ships—Postlethwaite is supported in his principles as to jurisdiction between co-owners, by Carthew 26, Beawes and Wood, and by the authorities in Rolles Abr. 533.—So in Zouch Elem. 370. Its jurisdiction extends to all causes of navigation and maritime negociation; and according to 1 Bacon, § 178, its authority to all the incidents and consequences of such causes—So in France, according to 1 Valin. 362, this is a proper question for admiralty jurisdiction; and he cites Vinnius and Lacennorius as authorities to justify the French practice; again in Zouch, a corresponding practice in the courts of Holland, Hamburgh and Great Britain is relied on in evidence of the jurisdiction; and the decision of the state court in the case of Glass and Gibb, in which all the powers of an instance and prize-court as they are divided in England, are held to belong to the district courts.

I am therefore of opinion, that the court has jurisdiction of the matter stated in this libel.

A shipwright has a lien for repairs in port.

Has a shipwright a lien on the vessel by him repaired, for the value of his materials, labor, &c. is the second question in this case. To decide this question it is necessary to examine the nature of liens and privileged debts, at the civil law.

Liens by the civil law are, 1st, express; 2d, privileged; 3d, implied or legal.—A difference is taken between the *pignus* which can only be of personal property actually delivered to the creditor—and the *hypotheca*, which is of real estates, and over which a right only is assigned to the creditor, the debtor remaining in possession. The terms however are convertible, and the legal incidents the same. The simple pledge or mortgage corresponds to that in use in England and this country, and a comparison of the British decisions with the Digest

SEAMEN'S WAGES.

Gardner et al. vs. the ship New Jersey.

Master's bill for necessaries allowed.—Claim for wages rejected.

The amount of the master's claim for $257, as stated in his petition, for monies expended during the voyage, for the purchase of necessaries required in the service of the ship, and wages paid to mari-

will shew that our system is almost wholly drawn from that code.

2d. A privileged mortgage, on which, if the remedy pursued be personal, the privilege is according to the order of time only; but if the remedy is pursued *in rem* the privilege operates without respect to time, and according to the cause of the debt, according to Zouch; privileged, are those creditors who are to be preferred, in the course of payment, before other creditors, though prior in time, *e. g.* funeral charges, which are an expense of necessity, and the costs of an administration, which are for the common benefit of creditors.

3d. Implied or legal. These are given by law upon the presumed assent of the parties, where no express stipulation appears; as is the case of seamen's wages, storage of goods, and the distress for rent; of the latter description must be the libellant's case, if he has any lien at all. All the authorities of the civil law admit a ship-carpenter into the class of privileged creditors, without any regard to the place where the services are rendered; but it is not conceded by all, that he has the *jus hypotheca*. It is manifest his lien cannot be supported on principles of common law, since the very nature of the services of repairing a ship, precludes the idea of possession transferred from the owner. And the common law, which pursues strictly the old distinction of civil law between *pignus* and *hypotheca* only admits a lien, where there is an actual possession passed to the creditor. The extent of the incidents to a privileged debt are not necessary to be inquired into. By some civilians, cited by Zouch, a ship-carpenter is only considered as having a right of preference above other creditors, when the whole of the goods are insufficient to pay the aggregate of debts, and the jus hypotheca is denied. But Zouch, who I find is supported by the Digest, liber 20, § 21, vol. i, Corp. Juris. Civil. 1916, 1924, and 1932, supports his lien by the opinions and practice of

Gardner et al. vs. the ship New Jersey.

ners, is directed to be paid. The claim for his wages is disallowed; and the prayer of the petition of *Dr. Baldwin* cannot legally be granted.

I have gone so much at large into this subject, that the principles established in its discussion, may regulate future claims to monies brought into court, under similar circumstances.

other jurists, and the courts of Hamburgh, Holland and Great Britain, and satisfactorily explains the causes of the erroneous opinions of writers, who deny the lien of such a creditor to have arisen from not accurately attending to the difference between a *simple privileged* debt, strictly such, where among many of similar creditors the rule *prior in tempore potior est jure*, prevails, and a privileged mortgage or lien express or implied, where the cause of the debt, and not the time of its creation, governs.

The reason of the lien to ship-carpenters for repairs, independent of considerations of policy, even among contending mortgagees, is, that such services preserve the specific thing from destruction, and securing such subsequent creditors does not injure prior mortgagees or creditors, since the pledge is increased in value, in proportion to such services. Valin. vol. i, states, a corresponding opinion in France, and assigns the reason of the civil law. I am therefore of opinion, that a ship-carpenter, by the maritime law, has a lien on the ship for repairs in port. But this lien may be relinquished or lost, by acts which shew that other securities have been substituted and accepted; and the court, in examining the testimony applicable to this point, will make every presumption that a jury ought to make on the trial of questions of fact, but as the interest of no other creditor is involved in the libellant's claim, I cannot conceive of what importance it is now to ascertain whether his lien continues—since the cause being a maritime cause, the court has a jurisdiction over his person as well as over the ship. The jurisdiction must in its nature be complete—it cannot be confined to one of the remedies on a contract, when the contract itself is within its cognizance.

How this lien may be lost by him.

May proceed against the person of the ship owner, in the District Court.

SEAMEN'S WAGES.

Sundry Mariners,
versus
The ship Kensington,

1801.

Embezzlement in a foreign port. Persons not of the crew assisted in lading, and a box plundered part of the cargo assigned to be stowed by strangers; but the crew worked occasionally with them, and were ordered by the court to contribute to the loss out of their wages.

THE amount of wages was not disputed. The seamen were charged with a sum each (the whole being in the ratio of wages, averaged on the officers and crew) for a loss to the ship, in consequence of *embezzlement* of part of a box of cambrics and lawns, to a considerable amount. It appeared, from circumstances, that the embezzlement took place at the time of lading the ship in Liverpool, though it was not discovered until she was unlading at the port of *Philadelphia.* Several persons, not of the crew, were hired to assist in stowing the vessel at *Liverpool;* these had the part of the cargo assigned to them to stow, of which the box plundered composed an article; but the mate and some of the crew were always with them, and the case or box was in a situation to admit access of the crew, as well those who assisted the labourers, as any others of the seamen. The box was discovered to have been much injured and broken open with a crow-bar, or some such instrument, probably used at the time of stowage.

It was contended, by the counsel for the owners of the ship, that if it could be even proved, that the labourers hired at Liverpool to assist the crew, had committed the embezzlement, they were, *pro hac*

Mariners vs. the ship Kensington.

vice, part of the crew, and so the whole are answerable *civilly*, though not *criminally*.

Court. If it could be proved that the labourers committed the embezzlement, without the participation, connivance or knowledge of the mariners, the latter would not be bound to contribute. The policy of the law which obliges mariners, engaged for a voyage, to be responsible for each other in such cases, does not apply when occasional labourers, or other strangers, commit depredations without the fault, negligence or connivance of all, or any part of the crew. The labourers, in this case, were not part of the crew. It is true, that if seamen are hired for a voyage, and work on board the ship, in the harbour of outfit, they may sue in the admiralty for their wages, though the voyage does not proceed. But this does not warrant the doctrine set up by the respondent's counsel, who contend that the labourers are, *quoad hoc*, a part for whom all the crew are responsible.

The policy of the law, relative to embezzlement, does not apply where strangers have been employed in lading the ship.

Labourers no part of the crew.

There is no doubt but that the seamen are answerable for embezzlement, unless they can clearly shew either by positive evidence or strong circumstances, that it was committed by persons not of the crew. It is impossible for me to say, who committed the fact in question in this cause; it may have been either a separate, or joint act; it may have been perpetrated by the labourers alone, or in company with some of the crew. But, under the uncertainty, I think the law throws the burthen of proof on the mariners. They are *prima facie* responsible. Some of them were mixed with the labourers, and all of them had access to the box plundered. It would give an opening to danger-

Seamen answerable for embezzlement, unless they can clearly shew that the fact was committed by strangers.

Burthen of proof thrown on the crew.

ous and ruinous collusions and frauds, if mariners were discharged from their responsibility, merely because occasional labourers were hired, to assist in loading a ship. Under all circumstances, I am of opinion, that the mariners must contribute, respectively, their proportion of the loss, and I decree accordingly.*

Mariners v. the ship Kensington.

Injurious consequences of the contrary doctrine.

* Frequent decisions have been had, on the principles of this case. Where the crew are mixed with strangers, it behoves them to be peculiarly watchful; though, in some instances, it is severe on mariners. I have generally, however, suspected *collusion*, when I have enforced *responsibility*. One case occured, where the theft was, by circumstances strong and convincing, fixed on those *not of the crew*, and I decreed against any contribution. In a cause recently decided, the mate left the vessel in a port of St. Domingo, in possession of the blacks—went on shore without securing the hatches—some others of the crew followed his bad example—and only the cook and a sick mariner remained on board. The vessel was robbed in the night, by people from the shore, as it appeared from circumstances, to me. There was much contrariety in the testimony, but I was convinced, that part of the crew partook of the plunder. There was, beside, *gross negligence*, which, *of itself*, would incur *contribution*. I decreed retribution, on the usual terms. The articles lost, however, were greater in value, than the amount of wages due. I listen to testimony, to throw off responsibility, in mixed cases, in any reasonable degree satisfactory. The merchant, who increases the risk of the crew, by introducing strangers among them, cannot expect that strict and rigid proof, which is required in ordinary cases.

SEAMEN'S WAGES.

Jonathan Crammer, et al. mariners,
versus
The ship Fair American; Haga, owner; Fraily, master.

1806.

Embezzlement.

EMBEZZLEMENT was charged on five of the libellants, to repel their claim for wages. A quantity of *coffee*, four thousand weight was alleged to have been embezzled. It appeared by certificates, admitted by consent, from sundry merchants trading to Amsterdam, where the fact charged was said to have been perpetrated, that the difference between the weight of coffee in America and its produce at the Dutch scales varies between eighteen and twenty-two per cent, though in some cases it has exceeded the latter. The loss was estimated on a difference between twenty-two and twenty-six per cent, on what the whole of the coffee in question should have weighed, occasioning a loss of four thousand weight to the owner. Testimony was produced, which shewed only four hundred pounds to have been actually taken by five delinquents, though suspicion reached much further. No decision was had on the facts, but an intimation was given by the court, that no opinion could be grounded on mere suspicion; and a decree could only extend to the quantity actually proved, either by positive testimony or circumstances, to have been taken.

The court, on a compromise between the parties, ruled, on application for its opinion,

SEAMEN'S WAGES.

Crammer, et al. vs. the ship Fair American.

1. That although an embezzlement of part of the goods lost, be fixed on some of the crew, who must pay separately to the amount proved, yet they or the surplus of wages, if forfeited, or in the hands of the owner, remain further answerable, in a general contribution, for the balance.*

Although part of the embezzlement is fixed on, and paid by, some of the crew, yet all are to contribute to the residue. Master and officers join in this contribution.

2. That the whole must contribute, according to their respective wages, the captain and officers of the ship included.

3. Nor is any one to be excused from this general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder. This point occurred in the case of one of the seamen, entitled to his wages, who was confined in prison, during the period when the transaction happened.—The innocence of an individual is not the question; it turns on the joint obligation of all, to make retribution; it is part of the conditions, upon which they engage in their occupation.

Sailor absent, not excused.

* It has been held, and in some extensive *embezzlements*, I have so decided, that the actual perpetrator forfeits all right to wages. In most instances, a contribution to the amount, would absorb all the claim to wages. But in petty plunder of esculents, liquor, &c. I have not deemed it right to inflict so rigorous a forfeiture; yet I confess the point of toleration, or punishment, is difficult to ascertain. If the wages of those who actually commit an embezzlement be forfeited, they should be considered, in the hands of the owner, as part payment towards the contribution of the innocent members of the crew, where farther embezzlement than that fixed on individuals, has been committed. On this consideration, the opinion was given, according to the fact, respecting a further contribution by the guilty mariners.

SEAMEN'S WAGES.

Atkyns, mate,
versus
Burrows, master of the brig Huntress.

1804.

When and for what causes a mate may be displaced by the master.

Accounts for traffic and dealing between master and mate, not subjects of admiralty jurisdiction.

THE dispute, between the master and the mate, in this cause, was concerning the mate's wages. Process, or a citation was issued against the master and owner. There were accounts of monies and articles of traffic and dealing between the captain and mate, but they were not considered within the jurisdiction of the admiralty, except so far as they were connected with the claim for wages.

The master had, a short time before the arrival of the vessel at Philadelphia, the last port of delivery, turned the mate before the mast.

The mate insisted on his wages, agreeably to contract. He went on shore at Philadelphia, where the voyage ended, against the captain's orders, to take advice. He returned in a few hours (far under forty-eight) and tendered himself ready to assist in unlading the cargo, *as mate*. The captain refused to reinstate him in the capacity of mate, and he would not labour as a mariner, in delivering the cargo.

The forfeiture of wages was insisted on—

First. Because the captain had displaced the mate at sea, for causes of which he was competent to judge, and having legal authority so to do.

Atkyns, vs. Burrows.

Second. The mate had gone on shore without the captain's orders and against his directions—He had not assisted to unlade the cargo; and had left the ship before she was unladen, thereby incurring a forfeiture of all his wages, as he was absent without leave, and did not return on board, within forty-eight hours, as the act of congress directs.

On the first point. The causes assigned for displacing were—

First. The mate having been found asleep during his watch—the proof was, that the mate, who was lame in one of his feet, was found during the watch, lying for a few minutes on a hencoop. One witness said he was asleep; the other could not be positive, and spoke doubtfully.

Second. The mate had disobeyed the orders of the captain at sea, in neglecting to have the jib hauled down, on the approach of a squall, whereby the jib was split. The proof on this point was not satisfactory; it appeared that the mate had at first ordered the jib down—afterwards he conceived there would be no necessity for it—but on the squall encreasing he repeated, too late, the orders to haul it down: all this happened in the course of a few minutes.

Master offered as a witness, and refused.

The captain was offered as a witness, to prove these and other facts, which the mate denied. The judge refused to permit the captain to be sworn; alleging it to have been his practice not to admit such testimony. In this case there appeared much personal animosity; and the contest seemed to lay entirely between the master and mate. The master is answerable to the owners for damages accruing to them by his improper and illegal discharge

The master is answerable to the owners for damages accruing from the illegal discharge of mariners, and also for extravagant wages given.

Atkyns vs. Burrows.

of mariners, as well as for extravagant wages given to, or injurious contracts made with them. This, he said, was among the reasons inducing him to refuse permitting the master to be examined as a witness, in such controversies. The mate is permitted to sue in the admiraly, as a mariner. All general rules in cases of mariners apply to him. On the several points, the judge declared his opinion, and determined as follows.

Mate may sue for wages in the admiralty court. All rules operating on mariners apply to him.

Court. When I first came into this court, I found it taken for granted, that the captain had a legal right to displace the mate for just cause. I have seen repeated instances, where the exercise of this power was necessary for the safety of the ship; and I have examined into many cases, wherein it had been executed from arbitrary, capricious, and improper motives. It is established by the maritime laws, and so it ought to be, that the captain must be supreme in the ship. His lawful orders must be obeyed. But when a contract is in question, the law, by its proper courts, will see that it is not vacated, for any other than legal, reasonable and necessary causes. The courts will control and examine the powers and conduct of the master. He is authorized to give all commands for the navigating, government and safety of the ship; but he has no authority to nullify a contract at his will, or for light and trifling causes. A contract is a solemn engagement, not to be vacated without the consent of all parties, or on considerations, on which the law must decide through the tribunals established to make such decisions.

Master may displace the mate for just and lawful cause; but this cause may be enquired into.

The mate is a respectable officer in the ship, and generally chosen with the consent of the own-

ers; he is under the orders of the master, in his ordinary duty; but his contract is not subject to arbitrary control. He may forfeit his right to command and wages, by fraudulent, unfaithful, and illegal practices; by gross and repeated negligence, or flagrant, wilful and unjustifiable disobedience; by incapacity, brought on him by his own fault, to perform his duty, or palpable want of skill in his profession. These are very different from the charges alleged, but not satisfactorily proved, in this cause. I do not therefore think that the captain was justifiable in displacing the mate for the causes assigned. The safety of the ship often depends on this officer, who is sometimes more trustworthy and capable than the master; and commonly placed by the owners to encrease the security of their property. In case of the absence, incapacity or death of the captain, the command and responsibility devolve on the mate.* The causes of re-

Atkyns vs. Burrows.

Mate, his duties and responsibilites.

Circumstances which justify the removal of a mate.

Respectability of the station of mate, who is often more trustworthy than the master, and always is an additional security to the merchant.

* In a late case, in the district court, (January, 1807,) a question was made as to the responsibility of a *mate*, who, by the death of the captain, became *master*, by succeeding to that birth on a voyage. One under these circumstances, was offered as a witness, on the part of the owner, in a suit, by a mariner, against the ship and owner. It was said he was not answerable to the seaman for any wages; a liability for which, only attached *by contract* made with the late master; he was, therefore, disinterested in any event. On the other side it was contended, that by operation of law, the liability grew out of *service*, and not positive contract. If it did not reach farther than to the late master's death, it was operative for all wages accrued since that event.

Court. I will not determine this point, so as to preclude further investigation, if it shall arise in a question *directly*. I will not refuse to admit the witness, if it is pressed. But there

Atkyns vs. Burrows.

moval should, on all these considerations, be evident, strong and legally important.

Mate not being lawfully displaced, and offering to do his proper duty, should have been received.

The second point depends on the first—the mate tendered himself ready to perform his duty as mate, but the master refused to receive him in that capacity: he was not bound to act in any other station. If any loss accrued to the owners hereby, the master, and not the mate, is responsible. If a common mariner even rebels, disobeys and refuses to do his duty, but repents in time and offers amends, and a return to, and faithful discharge of his duty, the master is bound to receive him. If the master will not so receive and reinstate him, but discharges him, the maritime laws declare that he may follow the ship, and recover his wages for the whole voyage.

If a loss accrues when the mate is unlawfully displaced, the master must answer.

I do not think it necessary to determine the point made in this cause, "Whether the mate is, or is not, bound when the voyage is ended, to assist in unlading the cargo?" The mate seems peculiarly charged with this duty (however it may be

is other testimony, perhaps sufficient. I incline strongly to the opinion of the counsel for the owner. The necessary, but casual successor to the late master, is only accountable for his own transactions. *Bills of loading* signed by his predecessor, do not bind him, though he may be responsible for the goods, if on board, in their condition at the time he succeeds to the command. He must sue in the admiralty *as mate;* and his wages, as such only, are recoverable here.[a] His claim for services, as *temporary master*, either demanded as additional wages, or as a *quantum meruit*, must be agitated elsewhere.

Other testimony was produced, a compromise took place, and the point subsided.

a 2 Rob. Adm. Cases, vol. ii, p. 196, Philadelphia edition.

with the mariners) and he offered to perform the service. I have on many occasions, given my opinion on the subject of the duty of mariners, under similar circumstances with the mate. On the whole, I think wages must be paid agreeably to the contract in the shipping articles.

Atkyns vs. Burrows.

Wages decreed.

SEAMEN'S WAGES.

George Mitchell,
versus
The ship Orozimbo.

1806.

The second mate's wages disputed, because he was not a perfect seaman.

THE contract for wages in this case was not denied, but proof was adduced to shew that the complainant was incompetent, and did not understand perfectly the duty of a mariner.—Yet it appeared, that he had fulfilled all the duties commonly required from a second officer, about two weeks excepted, when he was sick. At the end of this period the master intermitted his office of second mate, and turned him before the mast. It appeared from circumstances, that the captain was personally acquainted with the complainant before the contract. It was in proof that he was a midshipman in the service of the United States, on furlough, and had acted in that capacity during several cruizes.

Court.—The true ground of all such enquiries is, whether or not, there has been fraud and imposition practised? If this fact is made out, the contract is not binding on the party deceived. This is a principle in both the common and maritime laws. If one ships as an officer, or mariner, and either expressly or impliedly, professes himself a mariner capable of thoroughly executing the contract, and it turns out otherwise, this court is in the constant habit of denying wages on the claim entirely; or allowing a *quantum meruit*, according to circumstances. The proof of such false professions must

be made out, and the fraudulent conduct designated, in some satisfactory way. In the case before me it is my belief, that the master was acquainted with the capacity of the complainant, as to seamanship; and that no fraud was practised. He made the engagement under a knowledge of the true state of the complainant's nautical abilities, or deficiencies. I am neither desirous, or accustomed to decide on other than such as appear to me legal principles. Where these justify me, I will take every fit occasion to encourage our midshipmen (having leave of the executive so to do) to enter into the merchant service, as a laudable mode of perfecting themselves in seamanship, instead of dissipating and wasting their time. I have always considered our navy a great school, among its other benefits, for teaching young men of education and respectable connexions, nautical knowledge. Although they may not be perfectly competent in all the drudgery and details of seamanship, they may, and very many do, acquire a sufficient knowledge to qualify them for commands in merchant ships. Other qualifications than those of mere seamanship, are required in those who act as officers in ships. I have had too frequent opportunities of perceiving, that many of those who are capable before the mast, are miserably incompetent on the quarter deck. Qualities, not commonly discovered by mere seamen, are here indispensably called forth. However desirable it may be, that an officer shall have gone through every grade of the occupation to which he is devoted, it often happens that those who have not practically or manually acquired their knowledge of all the duties of

Mitchell vs. the ship Orozimbo.

Midshipmen on furlough, should be encouraged to enter into the merchant's service.

Mitchell vs. the ship Orozimbo.

Wages allowed while he acted as second mate; and afterwards as an ordinary seaman.

mariners, are among the most intelligent and trustworthy masters and officers of ships.

How far these general remarks apply to the complainant, I will not undertake to decide. This seems to have been his first essay in a merchant vessel, and the master was willing to join in the experiment. After a trial for four months it appears that the captain thought himself justifiable in displacing his second mate; and occasionally putting the carpenter in his birth. No testimony is offered to shew the impropriety of this conduct. It appears that the complainant, thereafter, performed the duty of an ordinary seaman. I therefore decree, that he be paid according to contract, for four months, the time he served as second mate; and thereafter as an ordinary seaman, for the residue of the voyage.

Swift, Hastings, et al. mariners,
versus
The ship Happy Return.

COURT.

1799.

Whether mariners are bound, when the voyage is ended, to unlade the ship.

AS to mariners shipped "for the voyage," unless specially obliged by the articles, as they are in many ports of the United States, and elsewhere, it is questionable whether or not they are bound to unlade the ship, after the voyage is ended. I incline to think they are not so bound: the voyage is ended when the vessel has arrived at her last port of delivery, and is there safely moored. Should it be deemed an additional duty to their common maritime employment to unlade the cargo, they are only answerable in damages for neglect or refusal. The contract for the voyage cannot be so amplified and prolonged, as to subject mariners to forfeitures, after the voyage is completed, though the lading or ballast be not discharged. Laws so highly penal, must be construed strictly. In 1 Strange, 405, it will be seen that the general doctrine is, that "no wages are payable while the ship is lading or unlading." I presume, at the port of outfit and return, as well as under the circumstances developed in this case.

Guindage, or *hoisting*, supplementary labour, and extra allowance therefor.

By the laws of *Wisbuy*, art. 5, "the mariners shall have three *deniers* a *last*, for loading, and three for unloading; which is to be reckoned only as their wages for *guindage* or *hoisting*." These duties "are

Hastings et al. vs. the ship Happy Return.

never fixed on account of the dearness of provisions, and the value of money, which changes and encreases daily. The rate of *guindage* or *reguindage*" (hoisting up and down, or loading and unloading) "is commonly in France, five sols a last, which is two sols six deniers turnois, a tun."

Wages of navigation, and those for loading and unloading, distinct.

These authorities, among others, shew that there is a distinction in the maritime laws, between the wages of *navigation*, and those allowed for *loading* and *unloading;* the latter being considered independent and distinct services from the former.

Seaman bound to unlade and relade, at any port on the voyage.

On the voyage, at a foreign port of delivery, the seamen are certainly bound, under the penalty of forfeiture of wages, &c. to unlade and reload the ship.

Our act of congress for regulating seamen, only fixes, and with too little precision, the time when the wages are due and payable. It does not specifically declare who shall unlade the ship, after the voyage is ended: the words are, "and as soon as the voyage is ended, and the cargo or ballast be fully discharged, at the last port of delivery, every seaman or mariner, shall be entitled to the wages which shall be then due, according to his contract." By this it seems obvious to me, that in the contemplation of this law, following the principles of the maritime laws of other nations, the end of the voyage, "and the discharge of the cargo," are separate and distinct subjects; though time, after the discharge, is given to the merchant and master, to enquire into embezzlements and other malfeazances, and to collect the freight. The wages of the mariner are "due, according to his contract," when the voyage is ended, though not payable, until the expiration

End of the voyage, and discharge of the cargo separate subjects.

of the period allowed for collecting the freight. It is *debitum in presenti; solvendum in futuro.*

Hastings et al. vs. the ship Happy Return.

Wages are due, when the voyage is ended, but are not payable until the discharge of the cargo.

Advantage of neglect or refusal to unload has been seldom attempted to be taken in this port, with the single and *bona fide* intent of compelling the seamen to perform this service. Forfeitures of wages for a whole voyage have been called for on this account, most frequently when old quarrels at sea, or recent animosities, or differences about accounts, have embittered the parties. The law is too often, in violation of its principles, spirit and system, considered and applied to, as a means to gratify the passions. In disputes relative to seamen's wages, the most irksome and unpleasant part of my duty, this propensity is too often evinced, by one or the other party. In this port, it is the general custom to hire others than the mariners to lade and unlade vessels. The merchants find it more for their interest so to do, than to depend on the mariners, who are particularly ungovernable after a voyage is ended; and are, when arrived at home, impatient under confinement to the drudgery of unlading the cargo. The owners, too, wish to avoid the trouble, danger and expense of keeping fire, and cooking and furnishing provisions* on board

Custom in Philadelphia to hire others than the crew to unlade.

* Expenses for *boarding on shore*, in a foreign port particularly, has been often brought forward. I have always determined according to circumstances, finding no direct rule to guide me. *Cooking* and *provisions* actually furnished on board, have always been decisive with me, to deny allowance for boarding on shore. But where these have not been afforded; or if insufficient, irregular, or unsound, I have deemed myself justified in allowing charges for boarding. In one case, very atro-

Hastings et al. vs. the ship Happy Return.

the ship. This point is therefore rendered less important, under the custom prevailing here.

cious, I would have gone the length of payment equal to that directed for *short allowance*, but an accommodation took place. Expenses for boarding on shore have been voluntarily agreed to be paid; at others, so trifling a sum has been allowed by the master to the mariners, that I have been obliged to increase it, to a reasonable rate. Where no provisions were provided on board, or the means of supporting themselves on shore furnished, I have deemed it justifiable in the mariners to leave the ship; after tendering themselves ready to do duty, on being furnished with money or provisions for their support.

Controversies often arise on hospital bills, paid for sick sailors sent on shore in foreign ports. I have seldom satisfied myself in the decisions I have been obliged to give in such cases. The charge for medical or chirurgical advice, is commonly mixed in the gross, with the general items, per day or week, for boarding and attendance. The sailor must only pay for the former. I think, if the merchant cannot specify the amount of this charge, he should pay it himself; as it is impracticable to fix it at discretion, in any just proportion; and I have sometimes erred in attempting it. By the laws of Oleron, a ship-boy, or nurse, must attend a sick seaman on shore; which would be more expensive than the controverted charges. When one of a crew is seized with an infectious disease, he should be removed from the rest, and sent on shore, at the ship's expense, for the safety of the whole, and the advantage of the owner, who must count on extra disbursements, if he will trade to ports or places, liable to such casualties. The charge should not be thrown on the sailor, and niceties insisted on, to shew that it was incurred *at his request*. It ought to be borne, from motives both of humanity and justice. So should it be, when proper care cannot be taken of sick seamen on board, and particularly when most, if not all, of the crew are infected. It is often endeavoured to be shewn that a sick seaman *made his election* to go on shore, and therefore he should pay the expense: but this is not correct. The law of *Oleron* expressly directs, that a sick seaman, (one really ill) *shall be put on shore*, and a ship-boy or

nurse employed to attend him, at the expense of the ship. The interests of commerce require liberality on this subject; yet I have, frequently, and most painfully, witnessed a contrary disposition. Laws cannot be made to reach every point. Although in ordinary cases, having a medicine chest on board, may be a compliance with the act of congress, exceptions should be made, where dangerous diseases require, and compel, extraordinary remedies and expense.

Hastings et al. vs. the ship Happy Return.

Wilson, mate,
versus
The brig Belvidere.

1806.

A cask of wine lost in hoisting on board, by a casualty, and charged to the mate.

AT a foreign port of delivery and re-loading, where mariners are bound to deliver and reload; a cask of wine having been brought along side, and slung, in a lighter, by men not of the crew, was hoisted on board by part of the crew, and the mate, who occasionally assisted at the tackle fall, when the labour was hard. On its arrival at the point of passage over the waist of the ship, which was high, the cask suddenly turned *athwart-ships*, slipped out of the slings, was stoven, and the wine lost. The wages due the seamen were paid to them without deduction, and the value of the wine was charged solely against the mate. It was alleged that it was the mate's peculiar duty to bear off the cask from the side, while hoisting; which had he performed, the accident would not have happened. Several casks, slung in the same way, had been hoisted in, and no casualty occurred. Many masters of ships were examined—It was the general opinion, as to the duty of the mate, that the bearing the cask off the side was not particularly incumbent on him, though it was often done by a mate, where the hands at the fall were no more than competent to that service. He might order a hand to this duty; but where *skids*, or other fixtures, for the purpose, were provided, it was not always necessary; and much depended on slinging the cask,—the business of the lighter-men.

Duty of the mate of a ship.

Court. When quarrels and personal dissensions arise between masters and mates, I have often had

occasion to make enquiries into the appropriate and respective duty of both. I have generally found great difficulty in ascertaining nice points of alleged duties, (many of them made on the spur) on which my decision must depend. In the present case, proof of two things is required:—1st. That the mate was bound to bear off the cask in question. 2d. That if it had been so borne off, it was so well slung, that no accident would have occurred.

Wilson, vs. the brig Belvidere.

It appears to me that the mate was not obliged, manually either to work at the fall, or bear off the cask from the side; though both are sometimes done by mates, from motives very commendable.

The second requisite, to wit, the slinging the cask, is not in proof, and would in its consequences be merely conjectural. If it was ill slung, the lighter men were solely responsible for the whole loss. Several casks slung in like manner, and none of them borne off the side, had arrived safe into the hold.

It therefore depends upon the *general principle*, and this case is only of consequence, as that applies. If the mate has been guilty of *gross negligence*, in any point peculiarly his duty, he alone is responsible. And so it is with the master or any officer, or seaman. It does not appear, in this case, that the mate was *grossly negligent*. On the contrary, he had reason to presume, while engaged at the tackle fall, that this cask was well slung, and would arrive at its birth as others had done. *Lighter men* to whom is committed the charge of transporting goods from the shore, and slinging them in the lighter, are responsible for this part of the business. So if *stevadores* are employed, they are responsible for the stowage of a ship. The *mate* must attend to the taking in, and delivery of the cargo. He must take

Negligence.

Lighter-men are responsible for slinging, in their barges, or lighters.

Stevadores.

Mate's duty in lading or discharging ships.

Wilson, vs. the brig Belvidere.

an account of it, according to established custom. He must exercise a general superintendance under the master, over the whole business; and if any special directions are given, he must obey them: where none are given, he must use common care and discretion, according to the best of his judgment; but he is not solely answerable for casualties. *Masters* often attempt to fix the sole responsibility on *mates*, to screen themselves, who, of all others, should constantly exercise the most care, and marked attention.

Masters peculiarly bound to care and attention.

If their engagements, in other duties, or their avocations, throw on the mates the executive duties, they being, (though approved by the owners) selected by the masters, and *their* deputies, the masters must share responsibilities when casualties occur. So must the seamen *generally;*—I say *generally*, because if goods are lost by bad ropes, or other defects of tackle, or furniture, against which *they remonstrate*, they are acquitted. The law emancipates the watchful, when they warn against impending misfortune,—but it mulcts in contribution the negligent and incautious.

They must share responsibility.

If the tackle is bad, and sailors remonstrate, they are acquitted.

The mate in the case before me, must bear his contribution, with all the rest of the ship's equipage, the master included, in proportion to their monthly wages. If the master has improvidently, or with design, paid off the seamen, it has no operation to affect the mate. His contribution is not more or less, on that score. It is a business resting entirely between the master, and those with whom he has thought proper to accommodate. This is often used as a means to introduce the seamen as witnesses, for purposes required by the party who deems their testimony necessary.

Adjustment with some has no effect on responsibilities of others.

Wages decreed, deducting a contribution.

AN APPENDIX

TO

VOLUME FIRST,

CONTAINING,

THE LAWS OF WISBUY—THE LAWS OF OLERON

AND

THE LAWS OF THE HANSE TOWNS.

THE

LAWS OF OLERON.

THIS justly celebrated code was originally promulgated by *Eleanor*, duchess of *Guienne*, the mother of *Richard* I, of *England*. Returning from the Holy Land, and familiar with the maritime regulations of the *Archipelago*, she enacted these laws at *Oleron* in *Guienne*, and they derive their title from the place of their publication. The language in which this collection of laws was originally clothed is that of *Gascony*, and their first object appears to have been the commercial operations of that part of *France* only.

By *Richard* I, of *England*, who inherited the dukedom of *Guienne* from his mother, this code was improved, and introduced into *England*. Some additions were made to it by king *John*, it was promulgated anew in the 50th year of *Henry* III, and received its ultimate confirmation in the 12th of *Edward* III.[a]

England and *France* contend for the honour of having originated this system of laws: but we only notice this circumstance to introduce the observation, that it affords the strongest testimony of the value of the collection, and of the high respect in which it is held by the two greatest nations of the world. Indeed it forms the basis of the celebrated ordinances of *Lewis* XIV, of *France*, and it is admitted as authority in the courts of common law, as well as the admiralty courts of England.

The translation now published is printed from the "Sea Laws," and the editor has carefully compared it with the copy published in *French* by *Cleirac*, in a work entitled "*Les Us. et Coutumes de la Mer.*" He has not considered himself authorized to make any alterations in the text, but wherever a variance between the copies has been discovered, he has pointed it out, and he has given the words of the French copy, with a particular reference to the passage from which, in his opinion, they differ.

a Brown, Civil and Adm. Law, vol. ii, p. 40.

HISTORY OF THE LAWS OF OLERON.

The "notes and illustrations," which are highly valuable, will be found by a reference to Cleirac, to have been principally abridged from his work, and, indeed, in some instances they are extracted verbatim. While an acknowledgement of the source from whence they were derived, would have been honourable to the candour of the compiler of the Sea Laws, these Commentaries would have obtained increased authority from the reputation and talents of their real author, who is justly estimated among the most distinguished jurists of France.

THE

LAWS OF OLERON.

ARTICLE I.

WHEN several joint owners make a man master of a ship or vessel, and the ship or vessel departing from her own port, arrives at *Bordeaux*, *Rouen*, or any other such place, and is there freighted to sail for *Scotland*, or some other foreign country; the master in such case may not sell or dispose of that ship or vessel, without a special procuration* from the owners: but in case he wants money for the victualling,† or other necessary provisions of the said vessel, he may for that end, with the advice of his mariners, pawn or pledge part of the tackle or furniture of a ship.

The master cannot sell a ship, but may pledge any part of her apparel for necessaries.

OBSERVATION.

The title of *master* is so honourable, and the command of a ship of such importance, that great care has been taken by all *maritime* nations, that none may be employed but honest and experienced men. By an ordinance of the admiralty in *France*, A. D. 1584, every master of a ship before he took upon him that trust,

* In the copy of the Roll d'Oleron, published by Cleirac, in the original French, the words are, "*procuration ou mandement spécial.*"

† "*Pour les dépens,*" in Cleirac's copy.—*E.*

THE MASTER CANNOT SELL HIS SHIP.

Art. I.

was to be examined whether he was fit for it. The *Spanish* naval laws require the same thing: *El maestre de la nave, para serlo, ha de ser marinero y examinado. Cedula real del Anno* 1576. *Impressa con las de Indias quarto tomo.* The ordinances and regulations of the *Hanse Towns*, do not only demand experience and capacity, but honesty and good manners. And none was to be admitted into the service of any citizen aboard his ship, without a certificate of his qualifications, as to his honesty and capacity. See their Book of Ordinances, book vi, art. 1.

The *Greeks* called the master of a ship Ναύαρχον, *cujus fidei navis concreditur*, to whom the government of the ship is entrusted; but so, that the master cannot sell the ship itself, nor any of her tackle or furniture, without the order or consent of the owners. However, in case of necessity, when he is in a far country, he may pawn or pledge her tackle for provisions, and if that will not do, he may borrow money on the ship's bottom, though not without the consent of his officers and seamen. According to the ordinances of *Wisbuy*, art. xiii, & xv, and *Philip* II king of *Spain's* ordinances in the year 1563, art. xii. Those of the *Hanse Towns* forbids a master of a ship, notwithstanding he is part owner, not only to sell, but to do any thing, even to buy tackle or victuals, without acquainting the other owners of it, unless it be in a strange country, and in a case of necessity, well and lawfully attested, art. iii, iv, v, &c. seq.

By the ordinances and customs of the sea, it appears, that formerly it was not thought safe to entrust a master of a ship with the vessel and cargo, unless he was a freeman of that city, and part-owner of the ship; and if he was part-owner, when he had betrayed or abused his trust, the other owners might turn him out of the ship, paying him what his part of her came to at the same price he gave for it. See the ordinances of the *Hanse Towns*, art. xiv. And if he pretended he had sold his part to another person for more than it was worth, the other owners might have it appraised, and take it to themselves, paying him what it was valued at by such appraisement, art. liii.

The master commonly took care of every thing belonging to the ship, from the poop to the mainmast. He was obliged to understand the art of piloting and navigation, that he might know how to control the pilot, and mind how he steers the ship, *y si el maestre no fuere piloto es obligado a vevar un marinero*

VESSEL ABOUT TO SAIL.

diestro en la navigacion, tel' que, pueda regir la nave a falta de piloto, according to the ordinances of *Spain*. The mate's command reached from the stern to the mizenmast, the latter included. It will not be thought improper by the curious to mention here the several officers of a ship, either men of war, or merchantmen, as they were distinguished aboard, a century of years ago. Art. I.

In royal navies the first officer was the admiral; then the vice-admiral, then the captain-major or chief of a squadron. In every man of war, the first officer was the captain, the second the pilot, who enjoyed that place in honour of the sciences he profest and practised; next to him was the master, who had the charge of the tackle and furniture, and then the captain, and lieutenant of the soldiers. In a merchantman the first officer was the master, the second the pilot, the third the mate, the fourth the factor, or supercargo; then his assistant, accomptants, the surgeons, the steward, four corporals, the cook, the gunner, the cockswain; the gunner and cockswain used to work before the mast, as well as the rest of the ship's crew, but their wages were more. There is a great deal of difference between the order of precedency on board of a ship now, and what was formerly: for the captain and lieutenant of the soldiers would think it very hard to give place to the pilot and master of a ship; and the factor, or supercargo, will as difficultly be persuaded to own the master of a vessel's superiority, except in what relates to the navigating the ship.

ART. II.

The master must consult the ship's company before he sails.

If a ship or other vessel be in a port, waiting for weather, and a wind to depart, the master ought when that comes, before his departure to consult his company, and say to them, *Gentlemen, What think you of this wind?* If any of them see that it is not settled, and advise him to stay until it is, and others, on the contrary, would have him make use of it as fair, he ought to follow the advice of the

Wilson, ux. the brig Belvidere.

an account of it, according to established custom. He must exercise a general superintendance under the master, over the whole business; and if any special directions are given, he must obey them: where none are given, he must use common care and discretion, according to the best of his judgment; but he is not solely answerable for casualties. *Masters* often attempt to fix the sole responsibility on *mates*, to screen themselves, who, of all others, should constantly exercise the most care, and marked attention.

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AND

THE LAWS OF THE HANSE TOWNS.

Art. IV. have been at, and reward them accordingly, without any regard to the promises made them by the parties concerned in the time of their distress.

OBSERVATION.

This law does not relate to an entire loss, but only to salvage, or rather not to the shipwreck, but to the disabling of a ship, so that she cannot proceed in her voyage without refitting. In which case the merchants may have their goods again, paying the freight in proportion to the way the ship made. If the merchant has not money to pay the freight, and the master will not credit, the latter may take his goods in payment at the market price. *Wisbuy*, art. 33, the emperor *Charles V*, ordinance, art. 40.

If the master can in a little time refit his vessel, and render her fit to continue her voyage, that is, if he can do it in 3 days time at the most, according to the *Hanse Town* laws; or if he will himself take freight for the merchandize aboard another ship bound for the same port to which he was bound, he may do it; and if the accident did not happen to him by any fault of his, the freight shall be paid him, *Lege Rhodior. numb.* 42, *secundo & ultimo tomo juris Græco-Romani in fine. Wisbuy*, art. 16. 37. 55. King *Philip* II, of *Spain's* ordinance, under the head of *Averages*, art. 30.

As for the charges of salvage, there are very great allowances made to the salvors, *lege Rhodior secundo tomo juris Græco-Romani*, num. 45 & 47. *Hermenopolus in Promptuario Juris*, lib. 2, tit. 6. By this law there was adjudged to the divers and salvors, the half, the third or the tenth of the things saved, and that according to the depth of the water out of which they were fished, fifteen, eight or one fathom; as also a tenth part for salvage on the coast, and the fifth to him that saving himself, carries and saves something with him. The promises that are extorted in danger on this account, ought always to be regulated according to justice, with reason and proportion, without keeping to the expressions of such promises; for this there are several laws in *France*, and an instance of it is thus recorded. A gentleman named *La Mothe*, embarked at *St. Machaire* with

two horses in a boat, going for *Bordeaux;* as they were in their passage, one of the horses grew furious, and leaped overboard. *La Mothe* held him by the bridle; the horse splashed the water up in his face, and the gentleman pulling his handkerchief out of his pocket to wipe it off, at the same time pulled out a purse that had thirty pistoles in it, which fell into the water. The boatmen came, and *La Mothe* desired them to take notice of the place, by observing the trees and buildings that were near it, and when the tide was out, to seek after the purse; promising if they found it, to give them a pistole for their pains. The boatmen excused themselves; nevertheless, when they had put *La Mothe* and his horses ashore, they went to look for the pistoles when it was low water, and one of them found them where they were dropt. His companions demanded their share of them, but he who had the good fortune to find the purse, would not let them have any of the gold, and there was a law-suit about dividing it, before the judge of *St. Machaire*. Monsieur *La Mothe* hearing of it, came thither and put in his claim to the purse and pistoles; but the judge gave it against him. He then appealed to the seneschal of *Guienne's* court, but with no better success; at last he appealed to the parliament of *Bordeaux*, and that court decreed, he should have his pistoles, but should pay 60 livres to the boatmen for their pains and trouble.

Art. IV.

ART. V.

If a vessel departing from one port, laden or empty, arrives at another, the mariners shall not leave the ship without the master's consent: if they do, and by that means she happens to be lost or damnified, they shall be answerable for the damage; but if the vessel be moored, and lying at anchor, with a sufficient number of men aboard to keep the decks and lading, they may go without the master's consent, if they come back in good time; otherwise they shall be liable to make satisfaction, if they have wherewithal.

Mariners shall not leave the ship while in port, without the master's consent.

MARINERS IN PORT.

Art. V.

OBSERVATION.

This article relating to seamen, it will not be unacceptable to the reader to observe what other customs and ordinances we have met with concerning them.

Mariners are obliged to look carefully after every thing that relates to the preservation of the ship and goods, *Consolato*, chap. 169, *Wisbuy*, art. 47. For which reason, they ought not to go ashore and leave the vessel, without the master or mate's permission: if they do, they are bound to answer all the damages that happen to the ship or merchandize in their absence, *Wisbuy*, art. 17. The emperor *Charles* V's ordinance in the year 1552, art. 9 and 10, conformable to the *Rhodian* law, *secundo tomo juris Græco-Romani*, num. 20. The regulations of the *Hanse Towns*, art. 40, ordain, That if any seaman goes ashore without license, and if in his absence the ship happens to be lost for want of hands, the seaman thus absent shall be apprehended, and kept a year in prison on bread and water; and if any one should be killed or drowned in his absence, and that be the cause of it, he shall be corporally punished. The same ordinances condemn those mariners that lie out of their ship all night, to pay all the damage that shall happen while they are absent. Those of the *Hanse Towns*, articles 22 and 23, add imprisonment. Some laws forbid them to undress themselves, and the *Hanse Towns*, art. 32, to lie with their wives aboard. The reason is, that they may always be ready to assist their fellows in the discharge of their duty in the preservation of the ship and goods. The obligation of the mariner to the master, begins as soon as he is hired and terms are agreed; and ends when the voyage is finished, and they are returned. The obligation of the mariner to the merchant is from the beginning of his charge, and the mariner is obliged to stow and unstow the goods, according as the place they are in is commodious or not, to keep them from damnifying, and promote or hinder the ship's trimming; and if by their refusing to do so, the merchandize is damnified or spoilt, they are bound to make the damage good, *Wisbuy* art. 48. *Philip* II, art. 19. By the laws of *Wisbuy*, they are also bound to unlade some goods with the shovel, and some to hand ashore; for

which they are to have no extraordinary allowance; but for letting things up or down, they are by the same laws to be allowed something extraordinary, that is above their wages. The laws are very severe against those seamen that run away from ships after they are hired. In men of war, desertion is punished with death; in merchantmen, by the *Hanseatic* laws, or those of the *Hanse Towns*, they are to be marked in the face with a red hot iron, that they may be known, and be infamous as long as they live. If the mariner runs away before the voyage, when he is taken, he ought to refund half as much as the master was to have paid him for the whole voyage. If he hires himself to two masters, the first may demand him, and by the *Hanseatic* law, art. 1, he is not bound to pay him any wages. Provision is made for such seamen as run away, only because the master has used them ill. By the same laws, if any master entices away a mariner hired before by another, the last master shall forfeit to the first 25 livres, and the mariner, half the wages he was to have had of the master that so enticed him. That master who knowingly hires a mariner who was hired before, shall pay double the wages he was to pay the mariner, and the latter be bound to follow and serve the first master. However, a mariner may demand, and ought to have his discharge, either before or during the voyage, for these four reasons: in case he is made master or mate of another ship; if he marries, and then he is obliged to refund what he has received; if he made any provision in his bargain for quitting the ship; if the voyage is finished, the ship disarmed, unloaded and light, the sails, tackle and furniture taken away and secured. See the laws of *Wisbuy*, art. 54 and 63. Art. V.

If the master gives a mariner his discharge, without any lawful cause, and for his pleasure only; in case he does it before the voyage, and while the ship is in port, he ought to pay half as much as he was to give him for the whole voyage; but if he discharges him after the ship is sailed, he ought to pay him all his wages. *Wisbuy*, art. 111.

By the *Hanseatic* law, the master is to pay a third of the wages only, and not to bring it to his owners' account. He is obliged also to pay him not only all his wages, if he discharges him in his voyage, but to defray the charges of his return. If after a bargain is made between the master and mariner, if the voyage

Art. VI. happens to be hindered by war or pirates, or any other lawful account, the mariner, according to king *Philip's* laws, art. 9, shall have a quarter part of the wages that were promised him for the voyage; and the master by a *French* law shall have half the freight. A master may turn off a mariner if he finds he is ignorant in maritime affairs, and incapable to perform the voyage, particularly a pilot, to whom in such cases he is not bound to pay any wages, and at his return may have him punished for his rashness, according to king *Philip's* and the *Hanseatic* laws. If it happens that the master finds out the pilot or mariner's ignorance when he cannot discharge them, they shall be obliged at their return to refund all the money he had advanced to them, and pay the master besides half what he had promised them: but if the pilot declares first he is dubious, and cannot depend on his knowledge, that he is out of the way, and does not very well understand his business; if it is when he is outward bound, he shall be paid half what was promised him; if homeward bound, all. If the master finds that any officer or seaman aboard his ship has any infectious distemper that is dangerous, he may put him ashore at the first place he comes to, without paying him any thing; but then he must prove it by two or three witnesses. He may also turn away any thieving mariner, or any quarrelsome or factious fellow; but as to the latter, he should have a little patience, to see if he can be brought to reason. Vide the *Hanseatics*, art. 29, and the laws of *Wisbuy*, art. 25.

ART. VI.

Mariners who become intoxicated and injure one another are to be cured at their own expense, and may be turned on shore.

If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; and if they make

MARINERS WOUNDED.

Art. VI.

But if wounded in the service of the ship, they must be provided for and cured.

words of it, they are bound to pay the master besides: but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.*

OBSERVATION.

By the laws of *Wisbuy*, art. 18, those mariners that are mutinous and quarrelsome, are obliged to refund all they have received, and pay besides what the master is forced to give to others whom he hires in their places above the wages he was to give them.

The laws of *Charles* V, art. 23, & seq. ordain certain punishments, according to the heinousness of the offences and crimes committed by seamen. If the mariners are wounded, or any wise hurt in serving the master of the ship, they shall be cured, taken care of, and indemnified at the charge of the ship, *Wisbuy*, art. 18. *Hanseatics*, art. 39. *Charles* V, art. 27, and 28. *Philip* II, art. 16. If mariners are taken by corsairs in his, and his ship's service, the master is bound to redeem them, and besides that, to pay them their wages, during their captivity, as much as if they had all that time been in his service. This law is in the *Consulat.* chap. 182. If in defending himself, or fighting against an enemy or corsairs, a mariner is maimed, or disabled to serve on board a ship for the rest of his life, besides the charge of his cure, he shall be maintained as long as he lives at the cost of the ship and cargo. Vide the *Hanseatic* law, art. 35. An instance of this is told by our author.

In the year 1621, *Giles Esteben*, a citizen and merchant of *Bordeaux* loaded a vessel of 36 tuns with wine for *Calais*, and gave the charge of the cargo to one *Fiton* his servant. The

* "*Ils doivent être guéris & pansés sur le coût de ladite nef.*" Cleirac, 15.—*E.*

Art. VII.

vessel set sail, and when she was at sea met with a *Turkish* rover. The corsair came up with her, and took her, but did not meddle with the vessel or the wine, either because the Alcoran forbids the *Mahometans* to drink or deal in wine, or because he held intelligence with the master of the vessel, who was a *Scotchman;* for he did him nor any of his crew no manner of hurt, but took away *Fiton* and sold him in *Barbary* for a slave. He remained there four years and a half in great misery and poverty; at last he was redeemed by alms in the year 1625, and paid for his ransom 780 livres. *Fiton* returning to *Bordeaux*, found that his master *Esteben* was dead; however, he entered an action in an inferior court against the widow, for his wages, as well for the time he was detained in slavery, as for that before his captivity, as also for the reimbursement of his ransom money, his losses and interest. The widow removed the suit to the higher courts, and from thence it came before the parliament, who decreed, that the widow should pay *Fiton* 1000 livres in full for his wages, redemption, expenses, loss and interest.

ART. VII.

A mariner falling sick on the voyage to be provided for, and if left on shore to have full wages for the voyage.

If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the ship-boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more, unless it please the master to allow it him; and if he will have better diet, the master shall not be bound to provide it for him, unless it be at the mariner's own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick

MARINERS DYING DURING THE VOYAGE.

party*—but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next kin shall have it.

Art. VII.

If he dies, his heirs to have them.

OBSERVATION.

The 19th article of the laws of *Wisbuy*, the 45th of the *Hanseatic* law, the 27th of *Charles* V, and the 16th of *Philip* II, which he compiled for the *Low Countries*, were all founded upon this law of *Oleron*, in what relates to a sick mariner, and agree exactly with it, both if he recovers his health, or dies in the voyage. The *Spaniards* have another custom in the *West India* voyages; for in case a mariner falls sick, he must substitute another in his place, otherwise he loses all his wages for the time in which he could not work. By the *Hanseatic* law, art. 45, if a mariner is detained ashore by sickness, the voyage ought not to be retarded on his account. By *Charles* V's ordinances, If the mariner dies as he is outward-bound, his wife and heirs shall receive half his pay: if as he is homeward-bound, they shall have all, deducting the charge of his funeral, if there has been any. In ships of war the custom in some places has been more favourable to sailors; for we find in a treatise written by *Francis Pyrard de Laval*, entituled, *Advis pour aller aux Indies Orientales*, that if a man died the first day of the voyage, his heirs were to be paid as much as if he had completed it.

ART. VIII.

If a vessel be laden to sail from Bordeaux to Caen, or any other place, and it happens that a storm

* "*Et s'il guerit il doit avoir son loyer tout comptant, en rabattant les frais, si le maître lui en a fait, et s'il meurt, sa femme et ses prochains le doivent avoir pour lui. Voyez le tit* 6 *de l'Ordonnance de* 1681. *Au surplus les malades sont mis a l'hôpital, & traités aux dépens du navir tant que dure le voyage.*—Cleirac, 17.—*E.*

Art. VIII.

When a vessel is in distress at sea, the master may throw part of the cargo overboard.

overtakes her at sea, so violent, that she cannot escape without casting some of the cargo overboard for lightening the vessel, and preserving the rest of the lading, as well as the vessel itself; then the master ought to say, *Gentlemen, We must throw part of the goods overboard;* and, if there are no merchants to answer him, or if those that are there approve of what he says by their silence, then the master may do as he thinks fit; and if the merchants are not pleased with his throwing over any part of the merchandize, and forbid him, yet the master ought not to forbear casting out so many of the goods as he shall see to be for the common good and safety; he and the third part of his mariners making oath on the Holy Evangelists, when they arrive at their port of discharge, that he did it only for the preservation of the vessel, and the rest of the lading that remains yet in her. And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the just value of the other goods that arrive in safety. And when these shall be sold, the price or value thereof ought to be divided livre a livre among the merchants. The master may compute the damage his vessel has sustained, or reckon the freight of the goods thrown overboard at his own choice. If the master does not make it appear that he and his men did the part of able seamen, then neither he nor they shall have any thing. The mariners also ought to have one tun free,* and another divided by cast

The value of the goods thrown overboard becomes a general average.

* "*Et pour recouvrer le dommage, les mariniers doivent avoir un tonneau franc.*" Cleirac, p. 18.—*E.*

of the dice, according as it shall happen, and the merchants in this case may lawfully put the master to his oath. Art. VIII.

OBSERVATION.

Of two evils, to choose the least is the law of nature as well as of nations; and when a ship is in danger of perishing, the lives of the seamen, and the safety of the rest of the cargo make the throwing part of it overboard the least evil. But that the master's ignorance or fear might not hurry him to do any thing to the detriment of the merchant, without good grounds for it, he must consult the merchants, passengers, or mariners aboard his ship, and, according as the necessity of it appears to them, to throw the goods overboard. This he is warranted to do by the *Rhodian* law. *Secundo Tomo Juris Græco-Romani, num.* 9, and by 20th, 21st, & 38th articles of that of *Wisbuy*. The 20th and 38th articles provide also, That if the merchants alone are against the proposition of throwing the merchandize overboard, and the rest, who have their lives and goods also to lose, consent to it, the master and third part of the seamen purging themselves as soon as they come ashore by oath, that necessity forced them to do it, and that otherwise they could not have been saved, may do it, and shall then be justified for what they did. The master is not obliged, when he comes to this extremity, to throw his own goods overboard first. The custom of the *Levant* is, the traveller or merchant first flings out something of his own. *Philip* the Second's ordinances, under the title of *Avaradges*, require, That the ship's utensils should be first thrown overboard, such as old cables, firewood, anchors and guns, which weigh heavy, and are not of the greatest service; then the chests belonging to the ship's crew, as being of the least value. All those things which are thrown overboard come into an average, except those that belong to the sovereign.

By the 38th article of the laws of *Wisbuy*, The clerk of the ship ought to register all the goods that are thrown overboard; and if there is no clerk aboard, it is convenient for the mariners to make attestation of them at the first port they come to.

AVERAGE.

Art. VIII. By the *Rhodian* laws, The goods that are damaged by the storm come into an average. By the same laws, if the master, by overloading his ship, is the occasion of the goods being thrown overboard, he shall make good the damage. The laws of *Wisbuy*, art. 46, except, in this case, those goods which were so loaden with the consent of the merchant. If the master has let out more freight than he has stowage for, he must not therefore overload his own ship, but by the *Consolato* is bound to find freight for them in another. If the merchants, passengers or mariners have any plate or other precious goods in their chests or cabinets, they ought to inform the master and clerk of it; otherwise their chests will not be liable to any average for any thing more than what is known to be within them. Persons never are reckoned in an average, but all sorts of goods whatsoever. Victuals belonging to the ship are exempted from the laws for throwing goods overboard, and privileged from paying contributions in averages. Seamen's wages are not liable to averages. By the *Hanseatic* law, art. 28, these wages ought to be paid by three payments, a third part before the ship goes out of the port, a third part when she is unladen, and a third part at her return.

By the *Rhodian* law, the sailors ought to have a ton freight free from contributions in averages, when goods are thrown overboard. To explain this it will be necessary to observe—that sailors were used to hire themselves out for a voyage for several considerations; some had a certain sum of money for the whole voyage, or so much a month, or so much a day; others hired themselves for such a proportion of the freight, or a liberty to load so much goods aboard, or let out so much freight to others. But the most common way, and the best of hiring themselves, was for part in wages, and part in freight, either for themselves or to let out. Those seamen who had wages only, contributed nothing to the average for goods thrown overboard. Those who had goods contributed, unless those goods were bought with their wages, and they had only one ton exempted. The merchants who hired their freight of them had the same privilege by it as themselves.

Having had occasion to make mention of *livre a livre*, an explanation of it will not be unacceptable to the reader. The

civilians consider every thing as one whole; as for example, an inheritance composed of several parts, makes together one whole or mass of inheritance, of whatever importance it may be, great or small, as if the whole of his inheritance made one livre, one pound, *as hereditatis*. This pound divided into twelve equal parts, is named ounces. The merchants and masters of ships, in case of averages for goods thrown overboard, or damnified in storms, have the same view; that is, they consider the ship and cargo together as one pound, and the goods lost or damnified as another; so that he who had a tenth in the pound of the cargo, a fifteenth, or any other share, must carry a tenth, a fifteenth, or any other share to the pound of the average; and this proportion of one pound to another, is what is called by the *French* naval laws, *livre a livre*, pound to pound. Art. IX.

ART. IX.

If it happen, that by reason of much foul weather the master is like to be constrained to cut his masts, he ought first to call the merchants, if there be any aboard the ship, and such as have goods and merchandize in the vessel, and to consult them, saying, *Sirs, it is requisite to cut down the mast to save the ship and lading, it being in this case my duty.* And frequently they also cut their mooring cables, leaving behind them their cables and anchors to save the ship and her lading; all which things are reckoned and computed *livre* by *livre*, as the goods are that were cast overboard. And when the vessel arrives in safety at her port of discharge, the merchants ought to pay the master their shares or proportions without delay, or sell or pawn the goods and employ the money he raises to satisfy by it the same, before the said goods be unladen out of the said ship: but if he lets them go, and there happens

Ship in distress at sea.

Masts, cables, &c. cut away to be charged as an average.

Art. IX. Freight to be charged on the goods thrown over in time of distress.

controversies and debates touching the premises, if the master observes collusion therein, he ought not to suffer, but is to have his complete freight, as well for what goods were thrown overboard, as for what he brought home.*

OBSERVATION.

No merchant is obliged to pay average for goods thrown overboard, unless the master can prove he did it for the safety of his own and his men's lives, and the preservation of the ship and the rest of her cargo. What loss happens by accidents, breaking the masts, or burning the sails, or pirates taking part of the goods, shall not come into the common average. By the *Rhodian* laws, every merchant shall bear his own loss, and the master shall do the same. See also the 12th article of the laws of *Wisbuy*. Averages are by that to be paid for damages done *ad intra*, and not for those *ad extra;* therefore the master and mariners are obliged to purge themselves by oath, how the damage came, in the first court of admiralty they come to, and that it was done in very great necessity. Indeed if pirates take the ship and cargo entire, and both are redeemed for a sum of money, the average for that shall be common, and all the concerned shall pay contribution. If the merchants and passengers aboard the ship desire the master to put into any port out of his way for fear of pirates, and in going out of that port he loses anchors or cables, those who desired him to put in there shall pay for them, and the ship ought not to pay any thing toward that loss. After a general shipwreck there is no average or common contribution, but *save who save can*, as is vulgarly said on this occasion. If any goods that were thrown overboard in a storm, to lighten the ship, happen to be recovered, the owner of them ought to restore what he had recovered for damages by average, to those that paid him, deducting for the loss he may

* "*Ains doit avoir son fret, comme si les tonneaux fussent péris.*"—Cleirac 24.

be at by his merchandize being damnified. The *Rhodian* law enjoins this. Art. X.

ART. X.

The master of a ship, when he lets her out to freight to the merchants, ought to shew them his cordage, ropes and slings, with which the goods are to be hoisted aboard or ashore; and if they find they need mending, he ought to mend them; for if a pipe, hogshead or other vessel, should happen by default of such cordage or slings to be spoiled or lost, the master and mariners ought to make satisfaction for the same to the merchants.* So also if the ropes or slings break, the master not shewing them before hand to the merchants, he is obliged to make good the damage. But if the merchants say the cordage, ropes or slings are good and sufficient, and notwithstanding it happens that they break, in that case they ought to divide the damage between them; that is to say, the merchant to whom such goods belong, and the said master with his mariners.

Cordage of ships let out on freight to be shewn to the owners of goods.

Injury to the cargo while loading.

* The following important passage has been omitted in the translation of this article:—"*Et si doit le maître payer selon qu'il doit prendre du guindage, et doit le salaire du guindage être mis à recouvrer le dommage, et le rest ou surplus doit être départi entr'eux.*" Cleirac. p. 26.

In France the owners of ships receiving freight, are not obliged to pay the expenses of loading or unloading, but they form a separate charge against the owners of the cargo. The passage above quoted authorizes a deduction from this charge, of the value of any article lost or injured from the negligence of the master to furnish proper cordage, &c. If this charge is not sufficient to compensate for the loss, the master and mariners are to make up the difference.—*E.*

INJURIES TO GOODS ON FREIGHT.

Art. XI.

OBSERVATION.

By the 12th article of the laws of *Wisbuy*, and the 7th of king *Philip's*, the master when he lets his ship out to freight, is bound to shew her to the merchants or their agents. The *Consolato* requires the same, and that the master should let the merchants visit not only the ropes, but all the ship above decks and below, that they may see what is wanting, and have it mended; and if it is not mended, and the merchandize is damnified, the master shall make good the loss. The 49th article of the laws of *Wisbuy* enjoins the mariners to give the master notice of the faults and defects in the cordage; otherwise they shall be responsible for all accidents that may happen; and if after such notice given, the master does not take care to have them mended, he shall answer the damage out of his own pocket.

The *Rhodian* laws *Secundo Tomo Juris Græco-Romani, num.* 11, wills and ordains, that the merchant who loads a ship, shall inform himself exactly of every thing, *Diligenter interrogare debet mercatores qui prius in ea Navi navigaverunt.* The law says he should enquire of those that have sailed in her before; but that is of little use, except as to her sailing, for ships grow daily more and more out of repair, and should be always viewed by the person that is going to be concerned in them, without trusting to the information of others.

ART. XI.

Injuries to the cargo during the voyage by bad seamanship.

If a vessel being laden at *Bordeaux* with wines, or other goods, hoists sail to carry them to some other port, and the master does not do his duty as he ought, nor the mariners handle their sails, and it happens that ill weather overtakes them at sea; so that the main yard shakes or strikes out the head of one of the pipes or hogsheads of wine; this vessel being safely arrived at her port of discharge, if the merchant alleges, that by reason of the main yard

his wine was lost; and the master denies it: In this case the master and his mariners ought to make oath (whether it be four or six of them, such as the merchant hath no exception against) that the wine perished not by the main yard, nor through any default of theirs, as the merchants charge them, they ought then to be acquitted thereof; but if they refuse to make oath to the effect aforesaid, they shall be obliged to make satisfaction for the same, because they ought to have ordered their sails aright before they departed from the port, where they took in their lading. Art. XI.

OBSERVATION.

This article is explained by the 23d of the laws of *Wisbuy*, which ordains, that if the cargo is ill stowed, and the ship ill trimmed, and the mariners do not manage their sails rightly, and any damage happens by it to the ship or goods, they shall be responsible for the damages as far as they have wherewithal to do it with. There were formerly, in several ports of *Guyenne* certain officers called *arrameurs* or stowers, who were master-carpenters by profession, and were paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely all goods in casks, bales, boxes, bundles or otherwise; to balance both sides, to fill up the vacant spaces, and manage every thing to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers; but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers*, who were very ancient officers, as may be seen in the 14th book of the *Theodosian code*, *Unica de Saccariis Portus Romæ*, lib. 14. Their business was to load and unload vessels loaden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandize otherwise.

QUARRELS BETWEEN THE MASTER AND THE MARINERS.

Art. XII.

ART. XII.

Quarrels between mariners, and the master and mariners at sea.

A master, having hired his mariners, ought to keep the peace betwixt them, and to be as their judge at sea; so that if there be any of them that gives another the lie, whilst they have wine and bread on the table, he ought to pay four deniers; and if the master himself give any the lie, he ought to pay eight deniers; and if any of the mariners impudently contradict the master, he also ought to pay eight deniers; and if the master strike any of the mariners, he ought to bear with the first stroke, be it with the fist or open hand; but if the master strikes him more than one blow, the mariner may defend himself: but if the said mariner doth first assault the master, he ought to pay five sols, or lose his hand.

The master may correct the mariners.

OBSERVATION.

This law restrains the correction of the master to one blow with his fist, which the mariner ought to bear, and no more. The *Consulate*, chap. 16, explains how far the mariner is bound to suffer his master's assaulting him, in these terms; "The mariner is obliged to obey his master, though he should call him ill names, and is enraged against him, he ought to keep out of his sight, or hide himself in the prow of the ship; if the master follows him, he ought to fly to some other place from him; and if he still follows him, then the mariner may stand upon his defence, demanding witnesses how he was pursued by the master; for the master ought not to pass into the prow after him.

The 24th article of the laws of *Wisbuy* punishes the giving the lie. The same article is very severe against the mariner that strikes the master. The mariner that strikes, or lifts up

arms against his master, was to lose half his hand in a very painful way. If the mariner has committed a crime too great for the master's authority to punish, then the master and his officers ought to seize the criminal, put him in irons, and bring him to justice at his return. Art. XIII.

ART. XIII.

Quarrels between the master and mariners. Seaman tendering amends, must be received on board.

If a difference happens between the master of a ship, and one of his mariners, the master ought to deny him his mess thrice, ere he turn him out of the ship, or discharge him thereof: but if the said mariner offer, in the presence of the rest of the mariners, to make the master satisfaction, and the master be resolved to accept of no satisfaction from him, but to put him out of the ship; in such case the said mariner may follow the said vessel to her port of discharge, and ought to have as good hire or wages, as if he had come in the ship, or as if he had made satisfaction for his fault in the sight and presence of the ship's company; and if the master take not another mariner into the ship in his stead, as able as the other, and the ship or lading happens thereby to be, through any misfortune, damnified, the master shall be obliged to make good the same, if he hath wherewithal.

OBSERVATION.

To deny him his mess, is, in the original, *oter la touaille*, an old *Gascon* phrase, which signifies to deny him the table-cloth or victuals for three meals; by which is understood a day and a half. The *Wisbuy* law, article 25, provides for the master's making satisfaction for the damages that may happen through the want of the mariner he turns off. And the laws of the

VESSELS INJURING EACH OTHER.

Art. XIV.

Hanse Towns, article 27, require the master not to give the seamen any cause to mutiny; not to provoke them, call them names, wrong them, nor keep any thing from them that is theirs; but to use them well, and pay them honestly what is their due. Some *French* laws ordain, that no mariner should be admitted under 18 years, nor above 50. The choice of the crew is entirely in the master: the reason is, that he ought to be himself very well assured of his seamen's ability, and not take it upon trust by report of others.

ART. XIV.

Vessels injuring each other.

If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize in each of the said ships damnified. In this case the whole damage shall be in common, and be equally divided and appraised half by half;* and the master and mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or wilfully. The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.

OBSERVATION.

This law agrees exactly with the 26, 50, 67, and 70th articles of the ordinances of *Wisbuy*. The dividing the loss in

* "*Le dommage du coup doit être prisé et parti moitié des deux nefs.*' Cleirac, 33.—*E.*

halves, is, to prevent any cheat; for an old vessel that's worth little or nothing, might else be put in a new one's way: and if she runs against her, more damages be pretended, than the old ship might fairly be valued at. Art. XV.

ART. XV.

Regulation of the anchorage of vessels in port.

Suppose two or more vessels in a harbour, where there is but little water, so that the anchor of one of the vessels lie dry; the master of the other vessel ought, in that case, to say unto him whose anchor lies dry; *Master, take up your anchor, for it is too nigh us, and may do us a prejudice:* if neither the said master nor his mariners will take up the said anchor accordingly, then may that other master and his mariners (who might be otherwise thereby damnified) take up the said anchor, and let it down at a farther distance from them; and if the others oppose or withstand the taking up of their anchor, and there afterwards happens damage thereby, they shall be bound to give full satisfaction for the same: but if they put out a buoy or anchor-mark, and the anchor does any damage, the master and mariners to whom it belongs are not bound to make it good; if they do not, they are; for all masters and mariners ought to fasten such buoys or anchor-marks, and such cables to their anchors, as may plainly appear and be seen at full sea.

OBSERVATION.

The 28th and 51st articles of the ordinances of *Wisbuy*, require masters to put out buoys to warn others where their anchors lie, on pain of making satisfaction for whatever damage may happen for want of them: for anchors hid under

Art. XVI. water, may do a great deal of mischief at ebb and low water. If any master spies them, and they lie near him, he may remove them, and prevent any damage coming to his ship. *Harmenopulus in promptuario titulo de rebus nauticis, licet in discrimen adductis, qui se aliter explicare non possunt, alterius navis anchoras salutis suæ causa præcidere.* The buoys that are made use of, are either empty barrels, or pieces of the trunk of a tree, or any other light wood with baskets that swim on the top of the water, and shews where the anchors lie.

ART. XVI.

Freight, allowed to mariners, regulated.

When a ship arrives with her lading at *Bordeaux*, or elsewhere, the master is bound to say to his company, when she is ready to load again, *Gentlemen, will you freight your own share yourselves, or be allowed for it in proportion with the ship's general freight?* the mariners are bound to answer one or the other. If they take as the freight of the ship shall happen, they shall have proportionably as the ship hath; and if they will freight by themselves, they ought to freight so as the ship be not impeded or hindered thereby. And if it so happen, that they cannot let out their freight, or get goods themselves, when he has tendered them their share or stowage, the master is blameless; and if they will there lade a tun of water instead of so much wine, they may: and in case there should happen at sea, an ejection or a casting of goods overboard, the case shall be the same for a tun of water, as for a tun of wine, or other goods, livre by livre.* If they let out their proportion of

* "*Parquoi les mariniers se puissent défendre et s'aider a la mer.*" Cleirac, p. 36. This is omitted in the translation of the XVIth article.—*E.*

freight to merchants, what freedom and immunity the said mariners have, the said merchants shall also have. Art. XVII.

OBSERVATION.

This article has some relation to the 8th, which treats of mariners' wages and their freight aboard. The 30th article of the laws of *Wisbuy* is founded upon it. By the seamen's immunity, is meant the privilege of being the last that must throw overboard in a storm, and having a tun free from all averages. The mariners freight should be first full; for the master is not obliged to stay for them when his cargo is all aboard. The reasons given by our author, why, in case of throwing overboard, the mariners tun of water shall come in equally in the average, *livre a livre*, for a tun of wine, are, a mariner may make what use he pleases of his stowage, because he takes it as part of his pay: besides, in such case, the water he has aboard, lightens the ship as much as if it was wine. And the mariner by throwing over his water, which by his privilege he may refuse to do, not only helps to save the ship and cargo, but to save the latter the more entire; for if any thing the merchant had aboard, of more value than wine, stood before his tun of water, it must have gone first, and his throwing his water overboard being so much for the common interest of the ship and cargo, he is allowed to come in upon an average, as if it had been a tun of wine. How far this law of *Oleron* prevails in our maritime courts now, the civilians must determine; but by the common law of England, a tun of water would never be rated *livre a livre*, pound by pound, with a tun of wine.

ART. XVII.

The mariners of *Britany* ought to have but one meal a day from the kitchen, because they have beverage going and coming. But those of *Normandy* are to have two meals a day, because they have only water at the ship's allowance; and when Allowance of provisions to mariners.

Art. XVII. the ship arrives in a wine country, there the master shall procure them wine to drink.

OBSERVATION.

The custom of giving every man a certain allowance is very ancient, and to prevent jealousies, complaints and disorders, that allowance is settled at so much a head, and exactly delivered out to all alike. As to the allowance of wine and meals by this article, the 29th of the ordinances of *Wisbuy* agrees with it. In those voyages where wine is to be had, the master is bound to provide it for the mariners, and then they shall have but one meal a day. But when they drink water only, they shall have two meals. *Charles* V, and *Philip* II's laws ordain, that the master shall order the mariners to have three certain meals a day, and if they would have more meat, they shall only have what was last at their meals, unless upon extraordinary occasions. By the 52d article of the *Hanseatic* laws, the master of *German* ships bound for *France* and *Spain*, are not to provide victuals for their mariners when they are outward bound; but when they are homeward bound, if the ship is let out to freight and loaden, the masters are obliged to maintain their mariners; if they return light or empty, they are not obliged. The *Portuguese* in their *East India* voyages, maintain both mariners and soldiers outward bound, and allow each a pound and a half of biscuit, 3 pints of wine, and 3 pints of water a day, and 31 pound of salt fish a month, some dry fish, garlic and onions. But in their homeward bound voyages, they have only biscuits and water to the Cape of *Good Hope*, and after that they live every man on his own provision.

——Facilis descensus ad Indos:
Sed revocare gradum, veteremque evadere ad Orbem,
Hoc Opus, hic Labor est——

In cases of necessity, when provisions fall short, those that have victuals aboard ought to communicate to those that have not, by the *Rhodian* law.

MARINERS' WAGES.

Art. XIX.

ART. XVIII.

When a vessel is unladen, and the mariners demand their freight, some of them having neither bed, chest, nor trunk aboard, the master may lawfully retain part of their wages, till they have brought back the ship to the port from whence she came; unless they give good security to serve out the whole voyage.

Part of the wages of mariners may be retained until the return of the ship.

OBSERVATION.

The 31st article of the ordinances of *Wisbuy* agrees exactly with this. The seamen's wages are not regularly due till after their work is entirely done, or the time they hired themselves for expired; except there are any private agreements to the contrary. The 28th article of the *Hanseatic* law ordains, that their wages should be paid at three several payments; one third when they set sail upon a voyage, one third when they arrive at their port of discharge, and the other third when the ship is returned home.

ART. XIX.

If the master hire the mariners in the town to which the vessel belongs, either for so much a day, week or month, or for such a share of the freight; and it happens that the ship cannot procure freight in those parts where she is arrived, but must sail further to obtain it: in such case, those that were hired for a share of the freight, ought to follow the master, and such as are at wages ought to have their wages advanced course by course, that is, in proportion to the length of the voyage, in what it was longer than they agreed for, because he hired them

Contracts with mariners for wages, or part of the freight.

Art. XX. to one certain place. And if they go not so far as that place for which the contract was made, yet they ought to have the whole promised hire, as if they had gone thither; but they ought likewise to bring back the vessel to the place from whence she at first departed.

OBSERVATION.

This article is explained by the 8th and 16th, and what is said upon them. The 32d of the laws of *Wisbuy*, the 12th and 13th of *Charles* V, and the 24th of the *Hanseatic* laws, are to the same purpose. By the 9th article of *Philip* II's laws, if the voyage is broken off by wars, pirates, or the command of the sovereign, the seamen ought to have a quarter part of the wages they agreed to have, if they had completed it. In the year 1626, about October, all the *English* ships that were then in the river of *Bordeaux*, were stopped by order of monsieur *de Luxemburgh*, governor of *Blaye*. Several of these ships were loaden with wine, and others with other merchandize. They were forced to return to *Bordeaux*, and unload; after which the masters demanded the whole freight of the merchants who had freighted them, by virtue of the law. *Colonus* §. *Navem conduxit. D. Locati.* Inasmuch as it was not their faults that they did not make their voyage, and carry the goods to their intended port: the freight was then 15 or 16 livres a tun: the admiralty court adjudged them a quarter part of it; they appealed to the sovereign court, who after two hearings set aside their appeal. Which instance of our author, makes somewhat against his own remarks.

ART. XX.

Mariners going on shore, while the vessel is in port.

When a vessel arrives at *Bordeaux*, or any other place, two of the mariners at a time may go ashore, and take with them one meal of such victuals as are in the ship, therein cut and provided; as also bread

MARINERS ABSENT FROM THE VESSEL.

Art. XX.

Answerable for the consequences of their absence when unreasonably long.

proportionably as much as they eat at once, but no drink: and they ought very speedily, and in season, to return to their vessel, that thereby the master may not lose his tide; for if so, and damage come thereby, they are bound to make satisfaction; or if any of their company be hurt for want of their help, they are to be at such charge for his recovery, as one of his fellow mariners, or the master, with those of his table shall judge convenient.

OBSERVATION.

The reason of this law now ceases for *Bordeaux*, for which place it was originally intended; for the said river is so full of eating-houses and taverns on both sides, that it is not likely sailors will carry any of their salt provisions ashore, when they can get fresh. The reason of it was to keep the seamen in health and vigour; for by encouraging them to go ashore, two at a time, when their attendance was not necessary aboard, the master gave them an opportunity to refresh themselves at land, which is the best remedy in the world for the scurvy, contracted on shipboard by living on salt meats and dry biscuit, and being crowded up in a close place for a considerable time: their eating fresh provisions, and breathing the free air at land, makes them strong, and the better able to go through their business. It was not lawful for mariners to be drunk, nor to feast on shipboard, unless there was good cause for their feasting, and the master allowed it. As we find by the 31st art. of the *Hanseatic* law, and the old law of *Rhodes*, *Vector in navi piscem ne frigito, & exercitor id ei ne permittito*,—as one of his fellow mariners. In the original, it is *Son Matelot*, which we in English call comrade; for it is the custom at sea to divide the ship's crew into couples: every two are comrades, and this the French call *Matelotage*. These two companions, or comrades should be loving and assisting to one another. Their task is generally the same, and they are always posted together.—Those of his table. The mariners in *Spanish* ships dress their meat, and pay for it, each man for himself; but in the *English*, *Dutch*, *German* and *French*,

Art. XXI. there is always a cook, and the seamen eat all together at the same table, six in a mess. There is commonly two tables; the master's, which is served with a table-cloth, and there himself and his officers eat; and the mariners, where they have their messes.

ART. XXI.

Demurrage. If a master freight his ship to a merchant, and set him a certain time within which he shall lade his vessel, that she may be ready to depart at the time appointed, and he lade it not within the time, but keep the master and mariners by the space of eight days, or a fortnight, or more, beyond the time agreed on, whereby the master loses the opportunity of a fair wind to depart; the said merchant in this case shall be obliged to make the master satisfaction for such delay, the fourth part whereof is to go among the mariners, and the other three-fourths to the master, because he finds them their provisions.*

OBSERVATION.

The 34th article of the ordinances of *Wisbuy*, and the 39th of the emperor *Charles* V, are entirely agreeable to this law. By the *Hanseatic* law and *Philip* II's, the merchant is obliged to pay the whole freight, if he does not load the ship in 15 days after the time agreed upon; and by the *Theodosian* code *de Naviculariis*, when a vessel arrives at a port loaden, the merchant to whom the cargo belongs, must unload in 10 days; but in our

* The right of the mariners to a part of the compensation allowed for the delay of the ship, could only arise, when they received a part of the freight instead of wages.—*E.*

VESSEL IN PORT WANTING SUPPLIES.

times, on account of holydays and Sundays, the common time for unloading a ship is 15 days: but that should not hinder the paying the freight, which ought to be cleared in eight days, whether the ship be discharged or not. The master for his pay cannot detain the merchandize aboard; but when they are in the boat or lighter, he may stop them until he is satisfied. Art. XXII.

ART. XXII.

When a merchant freights a vessel at his own charge, and sets her to sea, and the said vessel enters into an harbour, where she is wind-bound, so that she stays till her monies be all spent, the master in that case ought speedily to write home to his own country for money; but ought not to lose his voyage on that account; for if so happen, he shall be obliged to make good to the merchant all damages that shall ensue. But the master may take part of the wines or other merchant goods, and dispose thereof for his present necessities; and when the said vessel shall be arrived at her port of discharge, the said wines that the master hath so disposed of, ought to be valued and appraised at the same rate as the other wines shall be commonly sold for, and accordingly be accounted for to the merchant. And the master ought to have the freight of such wines, as he hath so taken and disposed of, for the use and reason aforesaid. Vessel in port wanting supplies.

OBSERVATION.

The 35th and 39th articles of the laws of *Wisbuy* are to the same purport as this; but by the 68th article of those laws, if the ship happens afterwards to be cast away, the master shall pay the merchant for the wines or other goods he sold in a case

Art. XXIV. of necessity, without pretending to deduct any thing for the freight. The *Hanseatic* laws forbid any master to borrow any money on any other security but the ship's bottom, that if she should be lost the debt might be paid; nor do they allow him when he is at home, to borrow any thing on her bottom, or otherwise, without acquainting the owners with it. By the 45th article of the laws of *Wisbuy*, the ship is bound to the merchant whose goods the master has sold in this manner, to make him satisfaction, though she should be herself sold, and have other owners.

ART. XXIII.

Pilot failing to perform his duty.

If a pilot undertakes the conduct of a vessel, to bring her to *St. Malo*, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head.

ART. XXIV.

Punishment of an ignorant pilot.

And if the master, or any one of his mariners, or any one of the merchants, cut off his head, they shall not be bound to answer for it; but before they do it, they must be sure he had not wherewith to make satisfaction.

OBSERVATION

On the two foregoing Articles.

The original calls these pilots *locmen;* for when those laws were written, there were officers aboard all ships, called pilots, who went the whole voyage, whereas the locmen were like our pilots, mariners hired at every river to guide the ship; for,

MALCONDUCT OF PILOTS.

dwelling on the place, the locman was supposed to know the shore better than the ship's pilot, who perhaps was never there before; for which reason he commonly required the master to have a locman, to avoid rocks, shelves, shoals and sands, which he must be well acquainted with by long using the river: that of *Roan* is very dangerous on this account, and there are sworn pilots every two leagues to guide ships up the *Seine*. They are very necessary all over *Brittany*. The 44th and 59th articles of the ordinances of *Wisbuy*, oblige the master to take a new pilot, if his own and the ship's crew demand one of him. The master finds him maintenance, and the merchant pays him, by the 60th article of the ordinances of *Wisbuy*. The loss of the pilot's head, if through his ignorance or negligence the ship is lost, is taken from the *Consolato*, chap. 250,—and answers to that known maxim in the law, *Qui non habet in ære, luet in corpore.* Art. XXV.

ART. XXV.

If a ship or other vessel arriving at any place, and making in towards a port or harbour, set out her flag, or give any other sign to have a pilot come aboard, or a boat to tow her into the harbour, the wind or tide being contrary, and a contract be made for piloting the said vessel into the said harbour accordingly; but by reason of an unreasonable and accursed custom, in some places, that the third or fourth part of the ships that are lost, shall accrue to the lord of the place where such sad casualties happen, as also the like proportion to the salvors, and only the remainder to the master, merchant and mariners: the persons contracting for the pilotage of the said vessel, to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, do like faithless and treacherous villains, sometimes even willingly, and out of design to ruin ship and goods, guide and bring her upon the rocks, Vessel run on shore intentionally by the pilot.

Art. XXVI. and then feigning to aid, help and assist, the now distressed mariners, are the first in dismembering and pulling the ship to pieces; purloining and carrying away the lading thereof contrary to all reason and good conscience: and afterwards that they may be the more welcome to their lord, do with all speed post to his house with the sad narrative of this unhappy disaster; whereupon the said lord, with his retinue appearing at the places, takes his share; the salvors theirs; and what remains the merchant and mariners may have. But seeing this is contrary to the law of God, our edict and determination is, that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said goods, shall be accursed and excommunicated, and punished as robbers and thieves, as formerly hath been declared. But all false and treacherous pilots shall be condemned to suffer a most rigorous and unmerciful death; and high gibbets shall be erected for them in the same place, or as nigh as conveniently may be, where they so guided and brought any ship or vessel to ruin as aforesaid, and thereon these accursed pilots are with ignominy and much shame to end their days; which said gibbets are to abide and remain to succeeding ages on that place, as a visible caution to other ships that shall afterwards sail thereby.

ART. XXVI.

If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to

Art. XXVI.

Punishment of those who encourage pilots in running ships on shore.

maintain and assist them in such villanies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls thereof shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity.

OBSERVATION

On the two foregoing Articles.

We shall find something very curious in the remarks made by the *French* author on these articles. These two laws, says he, were made upon account of that inhuman *Droit de Bris sur le Naufrages*, the right of lords of coasts to shipwrecks; by which those miserable wretches who were cast away, their very persons, and the goods that were saved, were confiscated for the prince who was lord of the coast. In the barbarous times men used to put this law in practice, especially the *Gauls*, who took all strangers for their enemies, and not only robbed them of their goods, but of their lives, sacrificing them to their false gods. From which bloody custom, Hercules brought them off according to Diodorus Siculus, lib. 5, Hist. cap. 2. *Pomponius Mela*, lib. 3, *de Situ Orbis*, cap. 2. The *Romans*, though they were covetous to excess, and greedy after other men's goods, never approved of this cruelty, but condemned and abrogated the use of it to the utmost of their power, *Toto titulo de Incendio, ruina & Naufragio. Et de Naufragiis libro undecimo Codicis*, leg 1, & leg. 3. But the empire degenerating in its decadency, when so many barbarous nations poured in upon it out of *Scythia* and *Scandinavia*, and tore it to pieces; this wicked *Droit de Bris sur le Naufrages* was renewed, particularly on the coasts of *Gaul*, called *Littus Saxonicum*, on account of the fre-

Art. XXVI. quent invasions of the *Saxons* there. Sidonius Apollinaris, lib. 8, epist. 6, & *carmine septimo*. Afterwards the *Normans* being by chance thrown upon that coast, were immediately dispatched by the inhabitants; and in course of time this pretended right insinuated itself, and prevailed not only against enemies and invaders, but against any persons that were shipwrecked. *Quidquid evadebat ex Naufragiis totum sibi Fiscus lege patriæ vindicabat, passosque Naufragium miserabilius Violentia principis spoliabat quam procella*, as says Hildebertus Turonensis, Archiepisc. epist. 32 & 65. At last the counts and dukes of *Armoreck*, *Bretagne*, and *Gaul*, were obliged by civility, and the request of the neighbouring people of *Bordeaux* and *Rochelle*, to change this barbarous custom of slavery and confiscation, into a tax for all such as procured licences from them; of which licences there were three sorts, *Bref de Sauveté*, *Bref de Conduite*, and *Bref de Victualle*. The first was to save them in case of shipwreck from the old forfeitures to the lord, and exempt them from the cruel *Droit de Bris*. The second was to allow them convoy upon reasonable terms. The third was for liberty to buy provisions in *Bretagne*. The dukes of *Bretagne* established an office and officers for giving out these licences, as at *Rochelle* and other places. The *Droit de Bris* was also practised in *Guienne*, *Saincttonge*, *Artois* and *Poictou*, but much more civilly and humanely than it was used in *Bretagne*; for the lords of the coasts took only a third or a quarter part, according to their several customs; the salvors as much; and the rest was restored to the poor wretches that were shipwrecked, and their persons were free. This barbarity is abolished in *England*, *Italy*, *Germany*, *Spain* and *France*, unless it be practised against the enemies of the state, infidels or pirates; but the *Spaniards* observe this custom beyond the line against all but natural *Spaniards*. This *Droit de Bris*, which was not however so cruelly executed in *Guienne*, as in *Bretagne*, was solemnly abrogated by *Henry* III, king of *England* and duke of *Aquitain* and *Guienne*. His edict for this purpose is registered and preserved among the Rolls at *Bourdeaux*, and is as follows:

SHIPS WRECKED.

Art. XXVI.

Henricus Dei gratia rex Angliæ, dominus Hiberniæ, dux Normand. Aquitan. & comes Andegavensis.

Archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, justitiæ præpositis et magistris, et omnibus ballivis et fidelibus salutem: Sciatis quod nos pro salute animæ nostræ, et antecessorum et hæredum nostrorum, et ad malas consuetudines abolendas concedimus, et hac nostra carta confirmamus pro nobis et hæredibus nostris in perpetuum, quod quotiescunque contigerit de cetero aliquam navem periclitari in potestate nostra, sive in costera maris Angliæ, sive in costera Pictaviæ, sive in costera insulæ Oleronis, sive in costera Vasconiæ. Et de navi taliter periclitata aliquis homo vivus evaserit, et ad terram venerit, omnia bona et catalla in navi istæ contenta remaneant, et sint eorum quorum prius fuerant, et eis non depereant nomine EIECTI. Et si de navi taliter periclitata nullo vivo homine evadente contingat, qualemcunque bestiam vivam evadere, vel in navi illa vivam inveniri; tunc bona et catalla illa per manus ballivorum nostrorum, vel hæredum nostrorum, vel per manus ballivorum dominorum in quorum terra navis fuerit periclitata libenter quatuor probis hominibus custodienda deponantur usque ad terminum trium mensium: Ut si illi quorum catalla illa fuerunt intra terminum illum venerint, ad exigenda catalla illa, et probare possint catalla illa sua esse, eis libenter restituant. Si vero infra prædictum terminum nullus venerit ad exegenda catalla sua, tunc nostra sint et hæredum nostrorum nomine EIECTI, vel alterius qui libertatem habet ejectum habendi. Si veru de navi taliter periclitata nullus homo vivus evaserit, nec alia bestia sicut prædictum est, tunc bona et catalla in navi illa contenta nostra sint et hæredum nostrorum nomine EIECTI, vel alterius ubi navis fuit periclitata qui Libertatem habet ejectum habendi: Quod volumus, et firmiter præcipimus pro nobis et hæredibus nostris. His testibus, venerabili patre Edvardo Karkol, episcopo, Bertrando clerico comiti Lincol. et constabulario, Petro de Mulo-lacu, Henrico de Trubleville, tunc Senescaldo Vasconiæ, Hugo de Dispencie, Godefrido Crantonibus, Amande Santo-Amando, Gulielmo de Crob. Anno 1226. Regni nostri vigesimo.

SHIPS WRECKED.

Art. XXVI. As to that part of these laws requiring traiterous pilots to be hanged on the shore, in some eminent place, to be a warning to all mariners; Andronicus, emperor of *Greece*, who reigned about the year 1150, ordered the same or the like punishment for such as made spoil of wrecks, as Nicetas reports in the second book of his Annals. The lord Verulam in his History of *Henry* VII, writes, that it was heretofore the custom in *England* to leave the dead bodies of pirates on gibbets near the water side, for a warning to seafaring men. *Morte affecti circa oras maritimas, ut loco signorum nauticorum & laternarum essent, & asseclas a littoribus Angliæ absterrere possent.* The hanging such as are condemned for crimes committed at sea by the water side, and some of the most criminal in chains, has been practised since in this kingdom. Those malicious fishermen, who in the night make fires in dangerous places to attract mariners thither, to the loss of their ships by making them believe they are near ports and inhabited places, deserve the same punishment. The author whom we have made use of on this occasion tells us, that *catalla*, a word in king *Henry's* charter, is originally *Gascon*, and signifies riches or merchandize. The *Picards* in their idiom have it *cateus*, in *Spanish* it is *caudal*, and in *English chattels*, than which no term is more frequent in the common law. The word in the *French* which is rendered *caution* in *English*, is *belise*, properly a beacon; but in this place it is used metaphorically: for a gibbet would be an odd sort of a beacon in our language. There are several sorts of these *belises* or beacons at sea, set up to direct mariners to the right course they ought to take to avoid danger. These are very necessary in those parts where there are bars, that is, entrances, where there must be a high tide to carry ships over them. Sometimes buoys are made use of for *belises*, and sometimes trees, light-houses, and other things. The burning the criminal's house, mentioned in these two articles, and all that is in it, shews what an opinion the legislator had of the heinousness of the crime. Coiners were in *France* burnt in old times, and their false money with them; their buildings were levelled with the ground, their woods felled and rooted up, and the places that belonged to them condemned and strewed with salt, as was the town of *Poicters*, in the reign of king *Dagobert*.

UNLOADING SHIPS.

Art. XXVII.

ART. XXVII.

A vessel being arrived at her port of discharge, and hauled up there into dry ground, so as the mariners deeming her to be in good safety, do take down her sails, and so fit the vessel aloof and aft, the master then ought to consider an increase of their wages kenning by kenning; and if in hoisting up wines, it happens that they leave open any of the pipes or other vessels, or that they fasten not the ropes well at the ends of the vessel, by reason whereof it slips, and falls, and so is lost, and falling on another, both are lost; in these cases the master and mariners shall be bound to make them good to the merchants, and the merchants must pay the freight of the said damnified or lost wines, because they are to receive for them from the master and mariners, according to the value that the rest of the wines are sold; and the owners of the ship ought not to suffer hereby, because the damage happened by default of the master and mariners, in not making fast the said vessels or pipes of wine.

Injuries to the cargo while unloading. By whom compensation is to be made.

OBSERVATION.

Kenning by kenning, *veuë par veuë*, is a phrase used by mariners, as is also course by course, in the 19th article of these laws. These phrases are very ancient, and kenning was particularly used when navigation was performed by views, and by observations on the land from one prospect to another, *Plin.* lib. vi, c. 13, which was before the invention or knowledge of the use of the compass. It signifies what the logicians or metaphysi-

Art. XXIX. cians called agreement; the arithmeticians and geometricians proportion, and others express otherwise.

ART. XXVIII.

Fishing vessels in partnership.

If two vessels go on a fishing-design in partnership, as for mackarel, herrings, or the like, and do set their nets or lay their lines at *Olonne*, *St. Gilles*, *Survie*, or elsewhere; the one of the vessels ought to employ as many fishing engines as the other, and so shall go in equal shares, as to the gain, according to the agreement betwixt them made. And if it happens that one of the said vessels, with her fishing-instruments, engines and crew, perish, and the other escaping, arrives in safety; if the surviving friends of those that perished, require of the other to have their part of the gain, as also of their fish, fishing-instruments, and boat, they are to have, upon the oaths of those that escape, their part of the fish, and fishing-instruments; but they shall not have any part or share in the vessel itself.

ART. XXIX.

Vessels wrecked on coasts.

If any ship or other vessel sailing to and fro, and coasting the seas, as well in the way of merchandizing, as upon the fishing account, happen by some misfortune through the violence of the weather to strike herself against the rocks, whereby she becomes so bruised and broken, that there she perishes, upon what coasts, country or dominion soever; and the master, mariners, merchant

or merchants, or any one of these escape and come safe to land; in this case the lord of that place or country, where such misfortune shall happen, ought not to let, hinder, or oppose such as have so escaped, or such to whom the said ship or vessel, and her lading belong, in using their utmost endeavours for the preservation of as much thereof as may possibly be saved. But on the contrary, the lord of that place or country, by his own interest, and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners, in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint; notwithstanding what promises may in that case have been made to the salvors by such distressed merchants and mariners, as is declared in the fourth article of these laws; and in case any shall act contrary hereunto, or take any part of the said goods from the said poor, distressed, ruined, undone, shipwrecked persons, against their wills, and without their consent, they shall be declared to be excommunicated by the church, and ought to receive the punishment of thieves; except speedy restitution be made by them: nor is there any custom or statute whatsoever, that can protect them against the aforesaid penalties, as is said in the 26th article of these laws.

Art. XXIX.

Salvage.

Promises to salvors in time of distress not to be regarded.

GOODS SAVED FROM SHIPS WRECKED.

Art. XXX.

OBSERVATIONS
On the two foregoing articles.

The civil law almost every where allows all shipwrecked persons, a right to gather up their shipwrecked goods. The *Codex* and the *Rhodian* laws are particular in this matter. King *Henry* III's charter, before recited, is very plain upon it; and the reader is referred to it.

ART. XXX.

Goods taken up from vessels shipwrecked.

If a ship or other vessel entering into harbour, happens by misfortune to be broken and perish, and the master, mariners and merchants, which were on board her, be all drowned; and if the goods thereof be driven ashore, or remain floating on the sea, without being sought after by those to whom they belong, they being ignorant of this said disaster, and knowing nothing thereof; in this most lamentable case, the lord of that place or country ought to send persons to save the said goods, which he ought to secure and to put into safe custody; and give the relations of the deceased persons who were drowned, notice of it, and to satisfy for the salvage thereof, not out of his own purse, but of the goods saved, according to the hazards run, and the pains taken therein; and what remains must be kept in safe custody for one year or more; and if in that time they to whom the said goods appertain, do not appear and claim the same, and the said year be fully expired, he may publicly sell and dispose thereof to such as will give most, and with the monies proceeding of the sale thereof, he ought to give among the poor, and for portions to poor

MARINERS ESCAPING FROM SHIPWRECK.

maids, and other charitable uses, according to reason and good conscience. But if he assumes the said goods either in whole or in part unto himself, he shall incur the curse and malediction of our mother the holy church, with the aforesaid pains and penalties, without ever obtaining remission, unless he make satisfaction. Art. XXXI.

OBSERVATION.

The keeping such goods a year, is in the civil law, l. ii, *Cod. Naufragiis:* but the parliament of *Paris* in the year 1584, pretended to reduce the time to two months: which time was to commence from the day of proclaiming such goods in public market and fixing a placquard of it on the doors of the parish church. The *Consulate* provides for the salvors more largely, allowing them half of the goods saved, and the lord and the poor the other half, chap. 252. By some laws in *France*, as long as the goods are in being and unalienated, the merchant to whom they belong, has a claim to them, paying the charge of salvage: but if after a lawful time, they are sold and become another's property, he has no claim to them. The casuists are of opinion, that if he who finds them is rich, he ought to give all to pious uses: if poor, to keep all himself, *hostiensis in summa de pœnitentia.* And the 36th article of the laws of *Oleron* agrees with the judgment of the casuists.

ART. XXXI.

If a ship or other vessel happens to be lost by striking on some shore, and the mariners thinking to save their lives, reach the shore, in hope of help, and instead thereof it happens, as it often does, that in many places they meet with people more barbarous, cruel, and inhuman than mad dogs, who to gain their monies, apparel, and other goods, do

Mariners escaping from shipwreck to be protected on shore.

MARINERS ESCAPING FROM SHIPWRECK.

Art. XXXI. sometimes murder and destroy these poor distressed seamen; in this case, the lord of that country ought to execute justice on such wretches, to punish them as well corporally as pecuniarily, to plunge them in the sea till they be half dead, and then to have them drawn forth out of the sea, and stoned to death.

OBSERVATION.

To plunge them in the sea, *plonger en la mer*, is what the *French* now call *bailler la cale*, and we keel-hawling. The word Κα]ταποντισμὸς, in *Greek*, signifies as much. The *Goths* heretofore used to practise it as a sport or exercise, *Olaus magnus historiæ Septentrionalis*, lib. v, et lib. x, c. 16. And one may conceive an idea of the barbarity of the northern nations, when that was a diversion to them, which was a punishment to others; as it was of old among the *Celtes* and *Franks*, and is now among the modern navigators. Lazy and scandalous persons had some such sort of punishment by the customs or laws of the old *Germans*, *Tacitus de Moribus Germanorum*, num. 5. *Turnus Herdonius* was punished thus to death for abusing and railing at the king *Tarquinius Superbus*, *T. Livius*, *lib. primo decadis primæ*. Bawds and whores are served so at *Bordeaux*; and scolds something like it in *England*, when they are put into the ducking stool. By an old ordinance of *Philip* II, of *France*, blasphemers had the same punishment. The comparison of a mad dog is perhaps made use of here, on account of the cure for his bite, by plunging in the sea before the poison has taken too deep root, which is reckoned the most sovereign remedy for it, *Augustine de Moribus Manicheor.* lib. ii, cap. 8. *Apuleius Metamorphos.* lib. 9. It is said *Baldus* the great civilian, died miserably of the bite of his favorite dog, though the bite was very inconsiderable, as to any thing but the effects of it; see the 21st book of *Ambrose Parre's* treatise of poisons: and *Diogenes* the cynic, according to *Laertius*, died the same death. My author has tempted me unawares to this digression, which he very ridiculously continues about a hundred times as long; for in

truth it may well be called a digression, at least, all that is not necessary to explain the metaphor in the text, and much farther we have not gone. Art. XXXII.

ART. XXXII.

Goods thrown overboard—when to be considered derelicts.

If by reason of tempestuous weather, it be thought expedient, for the lightening of any ship or vessel at sea, or riding at anchor in any road, to cast part of the lading overboard, and it be done accordingly for the common safety, though the said goods so ejected, and cast overboard, do become his that can first possess himself thereof, and carry them away: nevertheless, it is here to be further understood, that this holds true only in such cases, as when the master, merchant, and mariners have so ejected or cast out the said goods, as that they give over all hope or desire of ever recovering them again, and so leave them as things utterly lost and given over by them, without ever making any enquiry or pursuit after them: in which case only the first occupant becomes the lawful proprietor thereof.

OBSERVATION.

The property of things thrown overboard remains in the merchant, and the finder has no right to them, unless they were thrown out with an intention to leave them there, and look no more after them, *l.* 2, *in fine*, *l. qui levandæ D. Lege Rhodia. l. quod ex naufragio. D. de acquirenda vel amittenda possessione. Neptunus fastidiosus ædilis est. Siquæ sunt improbæ merces jactat omnes;* as *Plautus* says in *Stichor.* The sea drives all things to land: *mari hæc est natura, ut omne immundum, stercorosumq; littoribus impingat, Seneca naturalium quæst.* lib. iii, cap. 26. On this assurance, every one that flings his goods overboard in time of danger, hopes and desires to re-

Art. XXXIV. cover them again after seeking for them, and those things *non sunt in derelicto, sed in deperdito. l. Si quis merces. D. pro derelicto.* It is true, what is abandoned through contempt or carelessness belongs to the first occupiers; *quod dominus ea mente abjecit, ut in numerum rerum suarum esse nolit, qui primus occupaverit statim dominus sit Jure Naturali, Instit. de Rerum divisione 5, qua ratione: & lege 1. D. pro derelicto.*

ART. XXXIII.

Goods thrown overboard—when not to be considered derelicts.

If a ship, or any other vessel, hath cast overboard several goods or merchandizes, which are in chests well locked and made fast; or books well clasped and shut close, that they may not be damnified by salt water; in such cases it is to be presumed, that they who did cast such goods overboard, do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due enquiry after them; or put them to pious uses, according to his conscience and the advice of some prudent neighbour.

OBSERVATION.

Well clasped; this is conformable to the gloss on the *Rhodian* law. *D. Lege Rhodia.*

ART. XXXIV.

Articles found in the sea belong to the finder.

If any man happens to find any thing in the sea, or in the sand on the shore, in floods or in rivers, if it be precious stones, fishes, or any treasure of the sea, which never belonged to any man in point of property, it belongs to the first finder.

TREASURE FOUND ON THE SEA-COASTS.

Art. XXXVI.

ART. XXXV.

If any searches the sea-coasts to fish, or find gold or silver, and he finds it, he ought to restore it all without any diminution.

Gold or silver found, to be restored to the owner.

ART. XXXVI.

If any going along the sea-shore to fish, or otherwise, happens to find gold or silver, he shall be bound to make restitution thereof, deducting for his own pains; or if he be poor he may keep it to himself; that is, if he knows not to whom to restore it; yet he shall give notice of the place where he found it, to the neighbourhood and parts next adjacent, and advise with his superiors, who ought to weigh and take into consideration the poverty of the finder, and then to give him such advice as is consonant to good conscience.

Gold or silver found.

OBSERVATIONS

On the three preceding articles.

There are three sorts of goods which the sea naturally drives to land: as entire wrecks; for which the cruel *droit de bris* was in old times established by pernicious and barbarous custom: but humanity, licenses and passports have abolished it in ours. The second is, what is flung overboard for the preservation of men's lives, the ship and cargo. Neither of these, by law, nor the custom of the sea, change their proprietors, but may be claimed and recovered by them, within the lawful time appointed by ordinances and customs to claim them, even while the goods are in being and unsold, as appears by what has been said in and upon the 30th article. The third sort comprehends the two first, which are not owned and demanded by the proprietor, and besides that, includes all the treasures of the sea

TREASURES FOUND ON THE SEA-COASTS.

Art. XXXVI. which come out of its bowels, and it naturally drives ashore; as aromatic amber on the coast of *Guienne*, amber succinum in the *German* ocean, red, black, and white coral on the coast of *Barbary*, precious stones, fish-shells, and other riches which the sea produces, and which in the 34th article of these laws are called *herfes marines*, in *English*, treasures of the sea; for it cannot be otherwise so fully expressed. The word *herfes* was taken from an old *Gaulish* term *harfir*, which signifies to take, and its contrary *voerfir*, is to leave: perhaps, says my author, taken from the *Greek* word ἁρπάζω, *aurum mihi intus harfagatum est*, Plautus in *Aululari*a; that is, the property of such things is in the finder, or the person who first takes them from off the ground. *Vocari autem ELECIRUM harfaga, eo quod attritu digitorum accepta anima folia paleasque vestium fimbrias rafiat*, Isidorus orig. lib. xvi, cap. 8. Nor is he who first lays his hand on them, obliged to give those that are there with him a share of what he has found, unless he pleases to do it out of courtesy, *l. si is qui ultimo. D. acquirendo rerum Dominio. Robustus de frivilegiis Scholasticorum*, num. 61, notwithstanding the constitution of the emperor *Leo*, which is contrary to it. This is the law of nature, but princes and lords of the coast have usurped this privilege, and laid claim to all the treasures of the sea, that it throws on their royalties. The lords of the coasts, that is, of the manors or lands on the coasts of *France*, were notorious usurpers in this, till the reign of *Louis* XIII, when cardinal *Richlieu*, by an order of the council bearing date the 13th of December 1629, took away the pretended rights of several lords, or very much abridged them; but he did not restore the law of nature in this case; he only enlarged his own and his successor's privileges and authority, he being great master and superintendant general of the navigation and commerce of *France*. This order of council caused great disorders, and the count *de Olonne* was particularly so enraged at it, that his officers by main force drove away those of the admiralty, who came upon his royalty. But the *French* kings were now masters of their subjects' lives and fortunes, and it would have been in vain for many such counts to have disputed the king's edict with these words in it, *Car tel est notre filaisir*; the standing reason of the *French* laws at this time.

FISH FOUND ON SHORE.

Art. XXXVIII.

ART. XXXVII.

Great fish found on the sea shore.

Touching great fishes that are taken or found dead on the sea shore, regard must be had to the custom of that country where such great fishes are taken or found. For by the custom, the lord of that country ought to have his share, and with good reason, since the subject owes obedience and tribute to his sovereign.

OBSERVATION.

This law declares, that by the ancient customs of countries, as well sovereigns as all particular lords of royalties to whom duties and tribute were due, had both heretofore certain rights to the *estaves de mer*, strays of the sea. The *coustoumier de Normandie* under the article of *Varech*, specifies what belongs to the one, and what belongs to the other, and particularly that whales and other oil fish, belong to the particular lord of the royalty where they were found, that is, off whose land they were taken: on the shore—in the original it is—*a la rive de la mer*; and how far that is to be understood to belong to the lord of that royalty, may be found in the above mentioned *coustoumier*: where the *Varech* understands as far as a man on horseback can reach with his launce; for if the fish is found farther off the shore, the lord has no right to it, though it be brought or driven a-shore afterwards.

ART. XXXVIII.

Oil fish.

The lord ought to have his share of oil fish, and of no other, according to the laudable custom of the country where they are found; and he that finds them is no farther obliged than to save them, by bringing them without the reach of the sea, and presently to make it known to the said lord of the

Art. XXXIX.

place, that he may come and demand what is his right.

OBSERVATION.

The *Coustoumier de Normandie* mentions two sorts of fish, the royal fish, which are the dolphin, the sturgeon, the salmon, the turbot, the sea-dragon, the sea-barbel, and in general all fish fit for a king's table: and oil fish, as whales, porpoises, sea-calves, and the like, of which oil may be made: all other fish are the property of those that take them in the sea, near the shore or afar off. The duke of *Esternon*, which is the capital of a little territory called *de Buch*, had a right to the 8th penny of all the fish sold in the market at *Bordeaux*, that were taken within his precinct of *de Buch*, the fishermen having been heretofore vassals to the lords *de Buch*. And further, whatever part of the province of *Guienne* the duke was in, those fishermen were on all fast days bound to supply his table with fish for himself and his family; but then the duke must pay a reasonable price for them, and allow them something for their trouble: this right is called *bian*, and is still, or was thirty years ago, in being.

ART. XXXIX.

Fish found on shore.

If the lord of the place pleases, and if it be the custom of the country where the fish is found, he may cause the same to be brought by him that found it, to the public and open market place, but no where else; and there the said fish shall be appraised by the said lord, or his deputy according to custom. And the price being set, the other party that made not the price, shall have his choice, either to take or leave it at that price; and if either of them, whether *per fas* or *nefas* be an occasion of loss or damage to the other, though but to the value of a denier, he shall be obliged to make him restitution.

MERCHANDIZE FOUND ON SHORE.

ART. XL.

If the costs and charges of carrying the said fish to the said market place would amount to a greater sum than the fish itself may be worth, then the said lord shall be bound to take his share at the place where such fish was found. Division of fish found.

ART. XLI.

The said lord ought likewise to pay his part of the aforesaid costs and charges, because he ought not by another's damage to enrich himself. Expenses to be borne equally.

ART. XLII.

If by some chance or misfortune the said fish happens to be stolen away, or otherwise lost from the place where it was found, after or before the said lord has visited it; in this case he that first found it shall not any ways be obliged to make it good, *Casus fortuiti in quibus est agressura latronum a nemine præstantur l. quæ fortuitis. C. pignoratitia actione.* Fish stolen from the finder.

ART. XLIII.

In all other things found by the sea side, which have formerly been in the possession of some one or other, as wines, oil, and other merchandize, although they have been cast overboard, and left by the merchants, and so ought to appertain to him Merchandize found on shore.

FISH FOUND AT SEA.

Art. XLIV. that first finds the same; yet herein also the custom of the country is to be observed as well as in the case of fish. But if there be a presumption that these were the goods of some ship that perished, then neither the said lord, nor finder thereof, shall take any, to convert any part of it to their own use; but as has been said, distribute the money it produces amongst the poor and needy.

ART. XLIV.

Fish found at sea belong to the finders.

If any ship or other vessel at sea, happens to find an oil fish, it shall be wholly theirs that found it, in case no due pursuit be made after it; and no lord of any place ought to demand any part thereof, though they bring it to his ground.

OBSERVATIONS

On the preceding Articles.

The *French* author pretends, that by the 44th article of these laws, which he says answers to the 37th, the kings of *England*, who were also dukes of *Guienne*, acknowledged that the sea is no man's particular property; but that, as well as the air, it is common to all, *Instit. de rerum divisione*, § 1. *l. injuriarum*, § *si quis me prohibeat. D Injuriis*; which, says he, contradicts what the learned Selden writes in his treatise *de Dominio maris*, composed by him for the kings of *England*, whom he supposed to be kings of the sea, exclusive of all other kings and sovereigns; and unless the opposers of Selden, can find out some better arguments than hitherto they have alleged, the kings of *England* will always believe the dominion of the sea is annexed to their crown. Under this article the author makes a long digression on the whale fishery on the coasts of *Guienne*, which might in former times be very famous, but now is very inconsiderable. After a description of whales, not at all pertinent in

FISH FOUND AT SEA.

Art. XLIV.

our sea laws, he tells us, when those animals used to come on these coasts; and because there is something historical in the relation, we shall give the reader a short abstract of it. The whales used to pass by the coasts of *Guienne*, near the ruins of the old castle of *Ferragers*, about a league from *Bayonne*, from the autumnal equinox till the winter was almost over. The fishermen had then some of their band always out upon the watch night and day, in huts built on purpose by the sea-side, having their boats and fishing tackle ready. When these centinels discovered a whale, which they knew by the noise he makes in breathing, and the exhalation that rises from it like smoke, they gave notice, by a token they had for that purpose, to their fellows, who immediately ran to them, and leaping into their boats put off to sea, rowing up to the animal, to whom they approached very near, and attacked him in the head, that the wounds they gave him might be the more mortal; besides they were afraid of being struck by it, which was commonly mortal to them: when they had killed him, they towed him ashore and extracted the oil. The fishermen were for the most part *Biscainers*, who were very bold and dexterous in this dangerous fishery: but what my author says on this subject will surprise the reader. The great gains the inhabitants of cape *Bezton* near *Bayonne*, and the *Biscainers* of *Guienne*, found in the whale fishery, and the ease with which they did it, tempted them to run any hazards to come at whales. They ventured into the ocean, and set out ships to seek after the common abode of these monsters: insomuch, that following their route, they discovered the great and little banks of cod-fish, the island of *Newfoundland*, and *Canada* or *New France*, where the sea abounds in whales, one hundred years before Christopher Columbus's navigation; and if the Spaniards have been so unjust, as to rob the *French* of the glory of having first discovered the great Atlantic isle called the *West Indies*, they should confess with Cornelius Vuytfler and Anthony Magin, Flemish cosmographers, F. Antonio St. Roman, Monge de St. Benico, *del Historia general de la India*, lib. i, cap. ii, page 8, that the pilot who carried the first news to Christopher Columbus, and gave him any knowledge of the New World, was one of the *French Newfoundland Biscainers*. But all this is so contrary to every other history, that there is no credit to be given to it. Indeed it would have been

Art. XLV.

very extraordinary, if there should have been any honour pretended to by any nation, and the *French* had not put in a claim to it. In the year 1627, some *Biscainers*, assisted by the merchants of *Bordeaux*, fitted out a ship for the whale fishery towards the frozen sea of *Greenland*, to the north of *Ireland* and *Scotland*, and at *Spitzberg*: where they at last found the common station of the whales during a six months stay which they made there. But now we come to what he is pleased to say of the *English*.

The *English*, who had not the address or industry for this fishery, being advised of it, grew jealous. They hastened thither and did all they could to molest them in their work, and hinder their landing, which they did every year. At last they positively forbad them to land in *Greenland*, to melt their whales' fat into oil. The *Biscainers* complained to *Lewis* XIII, and cardinal *Richlieu*; but there were so many things of more importance then negociating between the crowns of *France* and *England*, that they could not obtain any article in their favour, nor truce for their fishery. Afterwards they fished in the open sea, caught whales where they could, and with much trouble brought the fat home, where they melted it into oil. The company of north *Holland*, tempted some of these *Biscainers* to shew their fishermen the art of whale-fishing, and after they were become expert in it, they also forbad them to fish on the coast of *Greenland*, and then this fishery was lost to them. There is an air of fiction in this history:—By what authority could the *English* forbid the *Biscainers* to land in *Greenland*; does that country belong to the crown of *England*? But it is not a little the *French* will go out of their way to carry any point they drive at.

ART. XLV.

Cables and anchors left by vessels in distress.

If a vessel by stress of weather be constrained to cut her cables or ropes by the end, and so to quit and leave behind her both cables and anchors and put to sea at the mercy of the wind and weather; in this case the said cables and anchors ought not to be lost to the said vessel, if there were any

buoy at them; and such as fish for them, shall be bound to restore them, if they know to whom they belong; but they ought to be paid for their pains, according to justice. And if they know not to whom to restore them, the lords of the place shall have their shares, as well as the salvors; but for preventing further inconveniences, every master of a ship shall cause to be engraven, or set upon the buoys thereof, his own name, or the name of his ship, or of the port or haven to which she belongs: and such as detain them from him shall be reputed thieves and robbers. Art. XLVI.

ART. XLVI.

The parts of vessels wrecked which are thrown on shore, to be preserved for the owners.

If any ship, or other vessel, by any casualty or misfortune happens to be wrecked and perish, in that case, the pieces of the hulk of the vessel, as well as the lading thereof, ought to be reserved and kept in safety for them to whom it belonged before such disaster happened, notwithstanding any custom to the contrary. And all takers, partakers, or consenters of, or to the said wreck, if they be bishops, prelates or clerks, they shall be deposed and deprived of their benefices respectively; and if they be laymen they shall incur the penalties aforesaid. *De his autem quos diripuisse probatum sit, præsides ut de latronibus, gravem sententiam dicere convenit. l. ne quid. l. quo Naufrag. D. Incendio, ruina, & naufragio. l. navigia, C. furtis.* The penalties aforesaid are in the 25th 26th and 29th articles.

PIRATES SHIPWRECKED.

Art. XLVII.

ART. XLVII.

The goods of pirates wrecked are not to be restored to them.

This is to be understood only when the said ship or vessel so wrecked, did not exercise the trade of pillaging, and when the mariners thereof were not pirates, sea-rovers, or enemies to our holy *Catholic* faith; but if they are found to be either the one or the other, every man may then deal with such as with rogues, and despoil them of their goods without any punishment for so doing.

OBSERVATIONS

On the three foregoing Articles.

Every one has a *Droit de Bris* against pirates. *Piratæ communes generis humani hostes sunt, quos idcirco omnibus rationibus persequi incumbit*, says the lord Verulam, *de Bello sacro*, p. 346. For which reason, according to the civilians, *Sunt ipso jure dissidiati, cum quibus publice bellum habemus. Strachia in tertia parte de nautis;* and again it is cruelty to have any mercy towards pirates, *Solum pietatis genus est in hac re esse crudelem.* There is no right of action amongst them, and they have none to bring against one who attacks them or robs them. *Quia in omnium furum persona constitutum est, ne ejus rei nomine furti agere possint, cujus ipsi fures sunt, lege cum qui § quarto, lege qui re sibi § primo. lege qui res. § si ego. De Furtis, &c.* They have no action among themselves. *Communi dividundo lege. communi § inter Prædiones. D. communi dividundo.* On the contrary, for one pirate to take from another is very lawful, and will bear no action. *Lege sed ipsi Nautæ*, &c.

The test of these laws in this copy, is,

Witness the Seal of the Isle of *Oleron*, established for all contracts in the said isle, the Tuesday after the feast of *St. Andrew*, in the year one thousand two hundred and sixty-six.

PIRATES SHIPWRECKED.

This date of 1266, is too modern, and does not agree with the time when this piece was put forth, as the learned and curious Selden, *libro secundo, capite* 24. *De Dominio maris*, very well observes: so that it is thought that this date of the time of the delivery of the copy, from whence the edition printed at *Rouen* was taken, and the test the seal established for contracts in the isle of *Oleron*, denotes, that it was a copy taken out by a notary from the original. Art. XLVII.

THE

LAWS OF WISBUY.

THE

LAWS OF WISBUY.

WISBUY was the ancient capital of Gothland, an island in the Baltic sea. It formerly belonged to Sweden, but was afterwards annexed to Denmark, to whose crown it still continues an appendage. In Gothland there are several fine ports, the access to which is easy and safe. It is rich in cattle, of which it affords immense numbers, and abounds in venison, fish, forests of fine timber for building ships, naval stores, and excellent marble. In the north-west part of the island Wisbuy was situated, a fair and noble sea-port, built by foreigners, and whose first settlement in the country was opposed by the Gothlanders, but who successfully resisted them, and, in the year one thousand two hundred and eighty-eight, obtained an important victory over them; after which the citizens, to defend themselves against their enemies, obtained a permission from *Magnus* king of *Sweden*, to wall their city, and erect bastions and other fortifications. They flourished more and more, and grew great by their trade and navigation, to which they entirely gave themselves up; insomuch, that this town was a long time the most celebrated market of Europe; there being no city so full of merchants, and so famous for its commerce. Hither came *Swedes*, *Russians*, *Danes*, *Prussians*, *Livonians*, *Germans*, *Finlanders*, *Vandals*, *Flemings*, *Saxons*, *English*, *Scots* and *French* to trade. Each nation had their quarter, and particularly streets for their shops or warehouses. All strangers were safe and welcome there, and enjoyed the same privileges as the townsmen themselves. The magistrates of this city had the jurisdiction, or rather the arbitrement of all causes or suits relating to sea affairs. Their ordinances were submitted to in all such cases, and passed for just on all the coasts of *Europe* from *Muscovy* to

Art. XXVI. the *Mediterranean*. In this account we are supported by *Olaus Magnus*, lib. x, cap. 16, and baron *Herbestain in rerum Muscovitarum commentario*, p. 118. In the course of time, this town was entirely destroyed, except the citadel, which stands to this day. The *Gothic* historians do not tell us when, nor how its destruction came upon it, only that it was through civil dissensions which arose from trifles, but occasioned great factions; which set them so against one another, that it ended in the entire ruin of them all, city and citizens. The ruins of it are now to be seen, and under them are often found tables of marble, porphyry and jasper; evidences of the ancient splendor and magnificence of the citizens. The houses were covered with copper, the windows gilt with gold, and all that is said or that is discovered of it, shews the inestimable riches of the former inhabitants. The citizens who survived the ruin of the city, retired to the country of the *Vandals* and eastern *Saxons*, who were enriched with their wealth. *Albert*, king of *Sweden*, rebuilt the city, and granted great privileges to all that should come and inhabit it; but it never could recover its trade and former magnificence.

It was in this city of *Wisbuy* that the sea laws and ordinances which the *Swedes* brought into credit, were composed; they were received as righteous and just, and are kept in the *Teutonic* language till now. The *Germans*, *Swedes*, *Danes*, *Flemings*, and all the people of the north observe them; but none have been so curious as to preserve the date and the remembrance of the time when they were composed and published.

Northern writers have contended that the laws of *Wisbuy* are more ancient than the *Roll d'Oleron*, and have even asserted the *Consolato del Mare* to have been composed subsequent to them. These claims are opposed with some irritation by Cleirac, who denies their having been promulgated prior to the year 1266. In this opinion he is supported by many historical facts. But at whatever period they may have been composed, these laws have been for ages, and still remain, in great authority in northern Europe. *Lex Rhodia navalis, pro jure gentium in illi mari Mediterraneo vigebat, sicut apud Galliam leges Oleronis, apud omnis transcribannos, leges Wisbuensis.* Grotius de Jur. Bel. lib. ii, c. 3.

THE

LAWS OF WISBUY.

ARTICLE I.

WHATEVER mariner, whether pilot, mate, or sailor, binds or hires himself to a master, if he afterwards leaves him, he shall refund what wages he has received; and besides that, pay half as much as the master had promised him for the whole voyage. And if a mariner has hired himself to two several masters, the first that hired him may claim him, and force him to serve him. Nevertheless he shall not be obliged to pay him any wages at all for the whole voyage, unless he does it of his own good will.

Mariners neglecting to perform their contract.

ART. II.

Every pilot, mate or mariner that does not understand his business, shall be obliged to repay to the master whatever wages he had advanced him, and be besides bound to pay half as much more as he had promised him.

Mariners incompetent to perform their duty.

ART. III.

A master may turn off a mariner without any lawful cause given, before he sets sail, paying him

Mariners dismissed by the master.

Art. VI. half what he had promised him for the voyage. After he has set sail, and is gone out of his port, that master who turns off a mariner without lawful cause given, is obliged to pay him all his wages, as much as if he had performed the voyage.[a]

ART. IV.

Mariners absenting themselves. [b]No mariner shall lie or stay a night ashore without the master's leave, on pain of forfeiting two deniers, nor shall he unmoor the ship's boat in the night, under the same penalty.*

ART. V.

Wages of mariners for unloading. The mariners shall have three deniers a last for loading, and three for unloading, which is to be reckoned only as their wages for guindage or hoisting.†

ART. VI.

Master and mariners exempted from arrest. It is not lawful to arrest or imprison the master, pilot or mariners of a ship in an action of debt,

[a] Laws of Oleron, art. 12, 13, 20. [b] Ibid, art. 5.

* By deniers here are understood, those of which twenty-four make an ounce of silver. The double deniers are now called carolus's or grand blancs, by the French and other nations.

† These duties are never fixed on account of the dearness of provisions, and the value of money, which changes and increases daily. The rate of *guindage or reguindage, is commonly in France five sols a last. Which is two sols six deniers tournois a tun.

* Hoisting up and down, or loading and unloading.

when they are ready to sail; but the creditor may seize and sell any thing he finds in the ship that belongs to his debtor, l. i, *de Navicularíis*, lib. iv, *cod.*[a] Art. X.

ART. VII.

A ship being freighted for all the summer, the season shall end on the feast of St. Martin, or the eleventh of November. Ship freighted for the summer.

ART. VIII.

Whoever shall make use of another man's lighter, without his leave, shall pay the owner four sols a day, unless it was in a case of necessity, as of fire or the like. Lighters.

ART. IX.

If any one has occasion to have a debt witnessed, he need not carry strangers aboard; but may make use of the people in the ship. The same he may do in all acts where witnesses are necessary, lib. x. cod. Mariners witnesses.

ART. X.

It is not lawful to sell or mortgage a vessel let out to freight; but it is lawful to freight it or underlet it to others for the same time, and the same voyage.* Vessel on freight not to be sold or mortgaged.

[a] Ord. Lewis XIV, L. ii, tit. 1, art. xiv.

* The words of this article are, *de le fretter ou sous-louer a d'autres pour le même temps, et pour même voyage:* which we think we have rendered right, notwithstanding the difficulty there seems to be in the sense, or the equity of this law.

Art. XIV.

ART. XI.

Change in the voyage of a freighted ship.

If a ship that was freighted for a voyage is sent upon another longer than that, or upon several voyages; if there is no protestation or dissent entered against it, the freighter shall pay but half the damages that may happen to the ship in such longer voyage or voyages.

ART. XII.

Masts and sails lost.

If a mast, sail or any other tackling is unfortunately lost when the ship is under sail, or otherwise, the loss shall not be brought into an average. But if the master is obliged to cut his mast by the board, or spoil any of his tackling for the preservation of the ship, the bottom and the cargo shall make good the damage by an average.[a]

ART. XIII.

Master cannot sell the ship, but may pledge her cables, &c. for necessaries.

The master shall not sell the ship, nor any part of her tackling, without the consent of the owners; but if he wants victuals he may pawn his cables and cordage: always observing to have the advice of the mariners.[b]

ART. XIV.

Master not to sail without the consent of the mariners.

The master being in port, ought not to depart and

[a] Laws of Oleron, art. ix.

[b] See art. x.—and Laws of Oleron, art. i.

set sail without the advice and consent of the major part of the mariners; if he does, and there happens any loss, he is bound to make satisfaction.[a] Art. XVII.

ART. XV.

The mariners are obliged to the utmost of their power to save and preserve the merchandize, and for doing it, ought to be paid their wages, but not otherwise. It is not lawful for the master to sell the ship's cordage, without the consent of the owners or factors: but he is bound to preserve all, as much as in him lies, on pain of making satisfaction.[b] Mariners to exert themselves to preserve goods.

ART. XVI.

The mariners are obliged to save as much as they can, and the merchants may take away their goods, paying the freight or satisfying the master; otherwise the said master may fit out his ship if he can do it in a little time, in order to accomplish his voyage; if he cannot do it he may relade the merchandize upon other vessels, bound for the port to which he was to carry them, paying freight for them. Goods saved from wreck, freight to be paid pro rata.

ART. XVII.

The mariners shall not go out of the ship without leave of the master, on pain of paying the damage that may happen in their absence, unless it is when the ship lies ashore moored with four Mariners may not leave the ship without the consent of the master.

[a] Laws of Oleron, art. ii. [b] Ibid. art. iii.

Art. XX. cables. In such case they may go out of her for a little time, taking care not to transgress in it.[a]

ART. XVIII.

Mariners wounded.

A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship: but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place.[b]

ART. XIX.

Mariners falling sick.

If a seaman falls ill of any disease, and it is convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there; and when he is recovered, be paid his wages; and if he dies, his wages shall be paid to his widow or heirs.[c]

ART. XX.

Goodsthrown overboard in time of distress.

If by stress of weather it is thought necessary to throw any goods overboard to lighten the ship; and the supercargoes or merchants aboard, will not consent to it, the merchandize shall nevertheless be thrown overboard, if the rest of the people aboard

[a] Laws of Oleron, art. v. [b] Ibid. art. vi. [c] Ibid. art. vii.

think it safest to do so. In such case as soon as the ship puts into port, a third part of the mariners must go ashore, and purge themselves by oath, that they were forced to do it for the preservation of their own lives, the ship, and the rest of the cargo. The merchandize so thrown overboard, shall be brought into a gross average, and be rated at the same price the other merchandize of the same sort, that was saved, was sold for.[a] Art. XXIII.

ART. XXI.

Before the master throws any goods overboard, he is bound, in the absence of the merchant, to ask the pilot and mariners' advice, and the loss shall be made good by contribution: the ship and cargo being accountable towards it.[b] Goods thrown overboard.

ART. XXII.

The master and mariners are obliged to shew the merchant the cordage that is used for hoisting his goods in and out of the ship; if he does not do it, and there happens any accident, they shall stand to the loss; but if the merchant has seen and approved of it, the damage he sustains shall be borne by himself.[c] Cordage for hoisting goods into the ship to be shewn to the merchant.

ART. XXIII.

If a ship is ill trimed, and it happens that the wine she has aboard is lost through the master's Ship ill-trimmed by the master.

[a] Laws of Oleron, art viii. [b] Ibid. art. viii. [c] Ibid. art. x.

Art. XXV. ignorance or negligence in governing her, the said master is bound to pay for it; but if the mariners clear him upon oath, the leakage or loss shall be borne by the merchant.[a]

ART. XXIV.

Quarrels and affrays.

No man shall fight, or give another the lie aboard. He who offends in this kind shall pay four deniers; and if the mariner gives the master the lie, he shall pay eight deniers: but he who strikes him shall pay 100 sols, or lose his hand.* If the master gives the lie he shall pay eight deniers; if he strikes he ought to receive blow for blow.[b]

ART. XXV.

Mariner dismissed for lawful cause, must be received on board again, after he makes amends.

The master may turn off a mariner for a lawful cause; but if the said mariner compensates for his fault, and the master nevertheless refuses to admit him again: the mariner may follow the ship to her destined port, and he shall be paid his wages, as much as if he had made the voyage in the same ship. If the master hires a less able seaman in his place, and there happens any damage by it, the master is to make good the loss.[c]

[a] Laws of Oleron, art. xi. [b] Ibid. art. vi. [c] Ibid. art. xiii.

* *Per dignitatem injuriam preferentis, crescit culpa facientis. Salvianus lib. sexto, de gubernatione Dei.*

Lose his hand. This was a common punishment among the Scythians and the people of the north.—*Lucianus de Toxari* And also among those in the east.—*Harmonopulus de Pœnis.*

VESSELS IN A HARBOUR.

ART. XXVI.

Vessels at anchor in a harbour injuring each other.

If a ship riding at anchor in a harbour, is struck by another ship which runs against her, driven by the wind or current, and the ship so struck receives damage, either in her hulk or cargo, the two ships shall jointly stand to the loss; but if the ship that struck against the other might have avoided it, if it was done by the master on purpose, or by his fault, he alone shall make satisfaction. The reason is, that some masters who have old crazy ships, may willingly lie in other ships way, that they may be damnified or sunk, and so have more than they were worth for them. On which account this law provides, that the damage shall be divided, and paid equally by the two ships, to oblige both to take care, and keep clear of such accidents as much as they can.[a]

ART. XXVII.

Vessels at anchor in a harbour.

A ship being at anchor in a harbour where there is so little water that she touches; another ship comes and anchors near her; if the ship's company of the former vessel require those of the latter to take up their anchor, because it is too near them, and they do not do it, the former may take it up themselves; and if the latter hinders them, they shall make satisfaction for all the damage that may happen by that anchor.[a]

[a] Laws of Oleron, art. xiv. & xv.

Art. XXXI.

ART. XXVIII.

Buoys must be put to anchors.

No master of a ship shall lie at anchor in a haven without fastening a buoy to his anchor, to give notice to others where it is. If he omits to do so, and any damage is sustained by it, he is obliged to make it good.

ART. XXIX.

Provisions allowed to mariners.

In all voyages where wine is the trade, the master is obliged to find the seamen with it, and then he may give them but one meal a day; but where it is not to be had, and the mariners drink water, he shall give them two meals a day.[a]

ART. XXX.

Freight allowed to mariners.

When a ship is let out to freight, the master ought to assign and shew the seamen where they are to have the stowage that belongs to them; and they must declare whether they will load it themselves, or will let the master freight it with the rest of the ship, and be paid for their proportion.[b]

ART. XXXI.

Mariners to give security when they receive part of their wages.

A ship being arrived at her destined port, those seamen who would be paid their wages there, if they have no chest nor bedding, or other moveables

[a] Laws of Oleron, art. xvii. [b] Ibid. art. xvi.

aboard, equivalent to their wages, they must give the master security that they will serve out the rest of the voyage, and see it completed, or he may refuse to pay them before.[a] Art. XXXIV.

ART. XXXII.

Those seamen who bargained for a certain proportion of the ship's freight, instead of wages in money, in case freight is not to be had for her when she arrives at the port for which she was bound, and she must go further in quest of it, they must go with her: but those seamen who agreed to be paid in money, shall have their wages there.[b] Mariners who contract for a part of the freight.

ART. XXXIII.

When a ship is safe at anchor, the seamen may go ashore one after another, or two together, and carry sufficient meat and bread with them for one meal, but no drink. Nor must they stay any long time ashore; for if through their absence any damage happens to the ship or goods, they are obliged to make satisfaction. And if any one of the crew is wounded, or comes by any other ill accident in doing the merchant's business, the merchant is bound to cure him, and indemnify the master, pilot and mariners.[c] A seaman may go on shore when the vessel is in port. If wounded in the service of the merchant he must be cured and indemnified by him.

ART. XXXIV.

A ship being let out to hire to a merchant to Demurrage.

[a] Laws of Oleron, art. xviii. [b] Ibid. art. xix. [c] Ibid. art. v. vi. xx.

Art. XXXVII.

freight her, and he agrees to load her in a certain time; if he fails and exceeds that time, fifteen days or more, and by this means the master loses his opportunity to freight his ship; the said merchant shall make him satisfaction for his delays, and pay his damages and interest, a quarter of which belongs to the mariners, and three quarters to the master.[a]

ART. XXXV.

Master in case of great necessity may sell part of the merchandize.

If the master being upon his voyage wants money, he must send home for it; but ought not to lose a fair opportunity of proceeding; if he does, he shall satisfy the merchant for all the damage he may sustain by his delay; but in case of great necessity he may sell part of the merchandize, and when he arrives at his destined port, he shall pay the merchant for them at the same price the rest was sold at, and the merchant shall pay freight as well for the merchandize the master sold, as for those he delivered him.[b]

ART. XXXVI.

Master must moor his ship well.

When the master arrives in a port, he should be careful to place his ship well, to moor her well; for if by his neglect in this the merchandize aboard comes by any damage, he is obliged to make it good.

ART. XXXVII.

Master may refit a ship injured by a storm.

If a ship has been in a storm, and the merchant,

[a] Laws of Oleron, art. xxi. [b] Ibid. art. xxii.

master or crew think she ought to be refitted, to enable her to continue her voyage, they may do it, and then proceed. However, the master shall be paid his freight for the goods saved, which are for the merchant's profit only. If the merchant has no money, and the master will not give him credit, he may take his merchandize in payment at the market price.[a] Art. XL. Freight.

ART. XXXVIII.

The master shall not throw any goods overboard, without first consulting the merchant; and if the merchant will not consent to it, yet if two or three of the most experienced mariners think it necessary, they may be thrown overboard, but the mariners must swear they thought it was expedient so to do. If there is no merchant or factor aboard, the master and major part of the mariners may resolve upon what is fit to be done.[b] Goods thrown overboard.

ART. XXXIX.

The merchandize thrown overboard shall be valued in the average, at the price the rest was sold for, freight only deducted.[c] Average.

ART. XL.

The master in the average shall pay his proportion for the goods thrown overboard, either by cal- The master must contribute to the average.

[a] Laws of Oleron, art. iv. [b] Ibid. art. viii.
[c] Ante page xviii, xix, xx.

Art. XLIV. culating what the ship is worth, or what the freight amounts to, at the choice of the merchant; and the merchant shall pay his, according to the value of the remaining merchandize. It shall be left to the merchant to leave or take the ship at the price the master rated her at.

ART. XLI.

Plate or valuable merchandize.

[a] If any one has plate or merchandize of great price in his chest, he is bound to declare it before hand, and so doing he shall be paid for his merchandize according to its worth, and the plate after the rate of two deniers for one.

ART. XLII.

Money.

If any one has money in his chest, let him take it out and carry it about him, and he shall pay nothing.

ART. XLIII.

The proprietor of a chest thrown overboard must declare its contents.

If a chest is thrown overboard, and the proprietor does not declare what is in it, it shall not be reckoned in the average, but for the wood and the lock, if it is locked, according to their value.[b]

ART. XLIV.

Pilots may be hired by the master.

If it is thought convenient in any river, or off any dangerous coast to take aboard a pilot of the coun-

[a] Ante page xx.

[b] Laws of Oleron, art. xxii.

try, and the merchant opposes it, yet if the master, the ship's pilot, and the major part of the seamen are of another opinion, he may be hired, and the pilot shall be paid by the ship and cargo, as averages are calculated for goods thrown overboard.[a] Art. XLVI.

ART. XLV.

If a master is reduced to straits for want of money or victuals, and for that reason forced to sell part of his merchandize aboard, or borrow money at bottomry, he ought to pay within 15 days after his arrival, for the merchandize at a reasonable price, neither the highest nor the lowest; and if he does not, and the ship be sold, and another master put in her, the merchant to whom the merchandize belonged, or the creditor that lent the money on bottomry, shall at any time within a year and a day, have a good right to the ship, until satisfaction is made for the goods sold, or money borrowed. Money borrowed on bottomry.

ART. XLVI.

A ship being loaden, the master ought not to take in any more merchandize, without leave of the merchant; if he does, and there happens any occasion to throw goods overboard, he shall pay as much as he took in goods over and above the ship's loading. Wherefore he ought when he is lading, to declare how much goods he has, and ought to have aboard. Goods taken on board without the consent of the merchant.

[a] Ante page xxviii, xxix. [b] Ante page xxxvii.

Art. L.

ART. XLVII.

Seamen must watch the merchandize.

The seamen are obliged to keep and watch the merchandize at the request of the merchants, master and pilot.

ART. XLVIII.

Seamen to be compensated for their attention to the cargo, and for unloading.

If for the preservation of the commodity, the seamen turn up the corn aboard, they shall be allowed a denier a last for each time; and if they will not do it, they are liable for the damage that comes to it for want of it. They shall also be allowed a denier a last for unlading, and so for other merchandize.

ART. XLIX.

Mariners must inform the master of the situation of the cordage.

The mariners ought to represent to the master what condition their tackling for lading and unlading is in; that if the cordage is out of repair, or any other part of it, it may be mended. And if the master does not do it, he shall be accountable for whatever damage happens by that means; but if the mariners do not make their representation, the accidents that befal the merchandize shall be indemnified at their expense.[a]

ART. L.

Ships striking against each other.

If two ships strike against one another and receive damage, the loss shall be borne equally between

[a] Laws of Oleron, art. x.

them, unless the men on board one of them, did it on purpose; in which case that ship shall pay all the damage.[a] Art. LIII.

ART. LI.

To prevent all inconveniences, all masters of ships are required to fasten buoys to their anchors, on pain of making satisfaction for all the damage that may happen for want of them.[b] Buoys.

ART. LII.

When a ship arrives at her port of discharge, she ought to be unladen with all possible dispatch, and the master to be paid in eight or fifteen days at farthest, according to the circumstances of the voyage.[c] Period allowed for the vessel to discharge.

ART. LIII.

If a ship freighted for one port, enters another, the master together with two or three of his chief mariners, ought to clear themselves upon oath, that it was by constraint and necessity that they went out of their way. After which he may proceed in his intended voyage, or ship the cargo aboard other ships, paying freight for the goods, which the merchant shall also pay him, and what else is due on account of the merchandize. Master and mariners must protest if the vessel enters a port in distress.

[a] Laws of Oleron, art. x. [b] Ibid. art. xiv.
[c] Ibid. art. xxi.

Art. LVI.

ART. LIV.

When mariners may leave ship, the voyage being ended.

It is forbidden to any mariner to go out of the ship, and leave it, after the voyage is done and the ship discharged, unless her sails are all in, her furniture taken away, and she is sufficiently lightened of her ballast.[a]

ART. LV.

Cargo taken out on the ship striking to be averaged.

If a ship strikes, the master may take out part of his cargo, and relade it aboard other ships, and the charges of it shall come into a general average upon ship and goods. However, the master and two or three of his seamen shall purge themselves upon oath, that they were forced to do it to save the ship and cargo.

ART. LVI.

The expenses of goods taken out of a vessel overloaded to form an average.

When a ship arrives at the mouth of any river or harbour, and the master finds she is too heavy loaden to sail up, he may put part of the cargo aboard hoys, lighters, or barges, and an average shall be made for it, of which the master shall pay two thirds, and the merchant one third; but if after the ship is entirely discharged, the ship draws too much water, and cannot sail up, then the master shall pay all the charges.

[a] Laws of Oleron, art. v.

Art. LXI.

ART. LVII.

The merchandize being put aboard lighters, in order to be landed, if the master has any jealousy of the merchant's ability or honesty to pay him, he may stop it at his ship's side, and refuse to let it go, till the merchant has paid him in full for his freight and charges. Lien of the master on the goods for freight.

ART. LVIII.

All lighters, open or close, shall be discharged in five days. Lighters.

ART. LIX.

When a ship is at anchor before a harbour with which her pilot is not well acquainted; the master ought to hire one at the place to carry his ship into it, who shall be paid by ship and cargo. Master to employ a pilot at the expense of the ship and cargo.

ART. LX.

When a ship is in a harbour or river, and the master does not know the coast nor the river, he ought to take a pilot of that country to carry her up the river or harbour, which pilot shall be maintained by the master, and paid by the merchant. Master may employ a pilot.

ART. LXI.

If a seaman deserts his ship, and carries away Mariner deserting.

Art. LXV. what he has received of the master, and the master apprehends him, the fact being proved upon him by the depositions of two other seamen, he shall be condemned to be hanged, and executed.

ART. LXII.

Mariner infected with a contagious disease.

If a master discover that a mariner is infected with any contagious distemper, he may put him ashore on the first land he makes, without being bound to pay him any wages, provided the case be proved by the attestation of two or three of the other mariners belonging to his ship.

ART. LXIII.

Pilot or mariner becoming master of a ship to be discharged from the ship to which he had belonged.

If a pilot or mariner buys a ship, or is made master of one, he shall be discharged from his own master, paying him back what he received of him; and it shall be the same if he marries.

ART. LXIV.

Differences between the master and owners.

If the master, merchant and owners have any difference, and the owners will not furnish their quota of the charge of the out-set; the master may nevertheless proceed in his voyage or voyages with the said ship, paying the seamen what he thinks reasonable.

ART. LXV.

Expenses of the master on account of the ship to be repaid by the owners.

If the master lays out any money in repairing or refitting his ship, or buys any tackling, or any thing

else for her use, he shall be reimbursed, and every owner pay his part. Art. XLIX.

ART. LXVI.

If the merchant obliges the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea. Insurances.

ART. LXVII.

If two ships strike against one another, and one of them unfortunately perishes by the blow, the merchandize that is lost out of both of them, shall be valued and paid for *pro rata* by both owners, and the damage of the ships shall also be answered for by both according to their value. Merchandize lost by ships striking against each other.

ART. LXVIII.

In case of necessity the merchant may sell part of the merchandize to raise money for his ship's use; and the ship happening to be lost afterwards, the master shall however be obliged to pay the merchant for the said merchandize so sold, without pretending to deduct any thing for the freight. Merchandize sold by the owner of the ship.

ART. LXIX.

When the master is forced to sell any of the merchandize, he is obliged to pay the same price for them, as the same goods were sold for at the market for which they were designed, and the master shall be paid his freight for what goods are sold. Merchandize sold by the master.

Art. LXX.

ART. LXX.

Ship under sail injuring another vessel.

If a ship under sail does damage to another, the master and mariners of the ship doing the damage must swear they did not do it designedly, and could not help it, and then the damage shall be borne by both ships in equal proportion; and if they refuse to swear, the damage shall be paid by the ship that did it.

THE

LAWS OF THE HANSE TOWNS.

THE HANSE TOWNS.

BEFORE we give an abstract of the laws of the *Hanse Towns*, the confederacy which enacted them, and whose commercial policy they regulated, is entitled to some notice.

During the progress of successful commercial enterprize among the *Italians*, and towards the middle of the thirteenth century, the activity of the north was excited, and its attention was awakened to commerce. The *Baltic* was surrounded by nations immersed in extreme barbarism, whose piracies prevented the success of almost every maritime adventure, and compelled the cities of *Lubeck* and *Hamburg*, who had opened an intercourse with those people, to unite in a league of mutual defence. The immediate and extensive benefits resulting from this union, induced other towns to accede to it, and in a short time eighty-one cities of considerable importance, placed in those fertile and extensive countries which occupy the space between the lower part of the *Baltic* and the *Scheld*, became members of the *Hanseatic* league. It now obtained an influence in the affairs of *Europe*; and while its allies were enriched by an intercourse with its members, its friendship was courted, and its hostility dreaded by the most powerful monarchs. Among the means adopted by this association to insure prosperity to their trade, and protect them from controversies with each other, was the formation of a code for the regulation of their maritime enterprizes, and the circumstances incident to them. These laws are evidently founded on those of the neighbouring city of *Wisbuy*, and the justly celebrated *Roll d'Oleron*. They appear to have been first enacted and promulgated in the year 1597, at *Lubeck*, which is styled the "Mother of the *Hanse Towns*." They were formed by a general assembly, called together for the purpose, and first appeared in the *German* language. After-

wards, in the year 1614, they were revised by another delegation from each of the towns, and many new ordinances were added.

For the convenience of their commercial operations, different towns were selected by the confederacy where they established warehouses and factories, and at which their intercourse with other countries was chiefly conducted. Among the principal of these was *Bruges* and *Antwerp*, in the latter of which was erected a splendid hall, at that period the boast of the modern world. There, were brought by the *Italians*, the rich productions of *India*, with the ingenious manufactures of their own country, to be exchanged for the bulky and useful products of the north. The articles obtained by the *Hanseatic* merchants in this intercourse, were transported to the *Baltic*, and from thence along the larger rivers into the interior of *Germany*.

An intercourse so profitable to those who were immediately engaged in it, produced other effects than an augmentation of the wealth of the *Hanseatic* confederacy. The arts of southern Europe began to be known; and a desire to imitate them, and to possess their productions, was the result of this knowledge. This intercourse created new wants as it increased the means of their gratification; and by the demands it excited among the inhabitants of the *Netherlands* and *Germany*, for commodities of every kind, industry was promoted; and at a very early period the manufactures of flax and wool had made considerable progress.

As *Bruges* became the centre of communication between the *Hanseatic* and the *Lombard* merchants, the *Flemings* traded with both in that city, to such extent and advantage as spread among them a general habit of industry, which long rendered *Flanders* and the adjacent provinces the most opulent, the most populous, and best cultivated counties in *Europe*.*

The pleasure which is derived from tracing the progress of such associations to prosperity, and noting their influence and connection with the welfare of other states, has induced us to enter more minutely into the history of the *Hanseatic* body, than was originally proposed.

* Robertson's History of Charles V.

If their example stimulated other nations to industry and trade, their laws must necessarily have obtained a corresponding estimation. Those institutions which protected the rights and regulated the contracts of these industrious adventurers, could not fail to obtain a due portion of praise and value. Accordingly we find them in extensive application among the northern powers of *Europe*, and governing them in their commercial transactions. By the most distinguished men of the fifteenth and sixteenth centuries, whose avocations induced their attention to them, they are spoken of with great respect, and esteemed as the production of great wisdom and extensive experience.

THE

LAWS OF THE HANSE TOWNS.

ARTICLE I.

Master undertaking to build a ship.

NO master shall undertake to build a ship, unless he is assured that his owners and undertakers are agreed upon what model it shall be built, and on every thing relating to the building of it; which undertakers and owners shall be burghers and inhabitants of one of the Hanse Towns, and no others. However, if the master will go through with the building at his own expense, he may do it; otherwise he must always have the consent of those burghers that are concerned with him, on pain of forfeiting half a dollar a ton.*

ART. II.

Ship built by a master.

No master shall begin to build a ship, after he and his joint owners or partners have resolved upon it, until they have agreed among themselves of what

* In the stile of the Hanse Towns, the owners of ships are called burghers; because none but the burghers of those cities in Germany, were permitted to build ships. The inconvenience provided against by this article is to save the materials of building, that none might undertake what they could not go through with, and thereby the materials be lost: for if he who begins to build a ship, is not very well able to perfect it, and has not the approbation of his joint owners or partners, such is often the end of too rash beginnings of this kind.

size, height and depth she shall be, how broad and how long, and this agreement shall be taken in writing on pain of forfeiting 12 sols a ton.* Art. V.

ART. III.

The master in like manner shall not repair the ship, sails or cordage without the owner's consent, on pain of being at all the charge of it himself, unless in case of necessity, when he is in a strange country. Master cannot repair his ship but in case of necessity in a strange country.

ART. IV.

The master may not buy any thing whatsoever for his ship, unless it is in the presence, and with the consent of one or two of the partners; if he does he shall forfeit 50 sols: nor shall the master, or any of the owners buy any thing for the ship's use, upon the credit of the other owners who would pay ready money for their part of the disbursement. Master not to purchase on account of the ship without the owners' consent.

ART. V.

An inventory shall be taken of every thing the ship wants, that it may be bought by the master and owners jointly. Inventory of articles wanted by the ship to be made out.

* It is the custom in the Levant, if during the building of a ship, any one of the owners die, his heirs are not obliged to continue the partnership; but the master undertaker is bound to look out for another owner in the room of him that is dead; and this new owner must pay the heirs of the deceased what the latter advanced on this account.

SHIP'S PROVISIONS.

Art. X.

ART. VI.

Purchases made by the master on account of the ship.

The master ought to buy every thing at the cheapest rate without fraud, on pain of corporal punishment; and he shall enter in his account the name of the person of whom he bought the goods, and where they live.

ART. VII.

Master or mariners not delivering all the merchandize.

If a master or mariner keep back any of the merchandize he took in on freight, they shall be apprehended and punished as robbers, unless it was in case of necessity.

ART. VIII.

Purchases on account of the ship.

Nor may they give above the market price for any provisions, and what they shall buy shall be carried to the ship's store-house, and be kept there till she is ready to sail.

ART. IX.

Master cannot sell the ship's provisions, except to vessels in distress at sea.

All masters are forbidden to sell any of the ship's provisions, on pain of being punished as thieves, except it is at sea, when they meet with other ships in distress and danger of perishing for want of them: for which they shall however be accountable to the owners.

ART. X.

Master to deliver up the remaining provisions on his return.

The master when the ship is returned, is obliged

to deliver up, to the owners, the remains of his victuals and ammunition. Art. XIV.

ART. XI.

The master is obliged to set sail two or three days after his ship is loaden, if the wind is fair, on pain of forfeiting 200 livres; and in case any one of the owners has not paid his quota of the charge of the ship's outset by that time, he shall forfeit as much; and the master may besides, borrow money on bottomry, for the deficient owner's quota. The merchants are bound to load the ship by a prefixed time, on pain of paying the whole freight, notwithstanding the ship proceeds in her voyage light, and in her ballast only. Sailing of ships from port.

ART. XII.

When the master gives in his account, he shall summon all his owners together, on pain of 100 livres forfeit. Master and owners.

ART. XIII.

The master shall not take any merchandize aboard on his head, or by the consent of one of his owners, without the approbation of them all: if he does, the penalty is confiscation, or other punishment. Loading of ships.

ART. XIV.

The owners having lawful cause, may turn off a master, paying him for what share he has in the ship, at the price it cost him. Owners may discharge the master.

Art. XIX.

ART. XV.

Ship owners not to employ a master without he produces evidences of his ability and honesty.

All owners are forbidden to entertain any master unless he produces a certificate of his honesty and ability, and that he quitted the service of the merchants he served last, with their consent: if they do, they shall pay 25 crowns penalty.

ART. XVI.

Owners to be consulted about the wages of mariners.

Before the master hires any mariner or pilot, he ought to acquaint the owners with what wages he is to give them, and have their allowance of it, under penalty of 25 crowns.

ART. XVII.

Ships in company.

If several ships are in company on the same voyage, they are obliged to stay for one another, or be liable to all the damages that may happen to the others by an enemy or pirates.[a]

ART. XVIII.

Before the master can hire mariners they must produce a certificate of their good conduct.

No master shall hire a mariner, before he has seen his pass or certificate of his faithful behaviour in the service of his last master, on pain of forfeiting 100 sols, unless he is necessitated to it in a strange country.

[a] Laws of Oleron, art. xxviii.

ART. XIX.

Masters are obliged to give mariners certificates of their faithful service; and if any one refuses, or delays, he shall forfeit 100 sols.

Masters must give mariners certificates of their conduct.

ART. XX.

A ship being forced to stay or winter in a strange country, the mariners are not to go out of her without the master's permission, on pain of losing half their wages.[a]

Mariners may not leave the ship while in port without permission.

ART. XXI.

If the master maintains the mariners all the winter, they cannot oblige him to give them more wages; but if they endeavour to do it, they shall forfeit half of what they were to have had, and be punished further, according to the circumstances of their offence.

Maintenance of mariners.

ART. XXII.

No seaman may go ashore without the consent of the master, pilot, mate or clerk of the ship, under penalty of 25 sols for each time.

Mariners may not go on shore.

ART. XXIII.

The seamen who are ashore with the master, are obliged to look after the boat, and return on board

Seamen on shore with the master to take care of the boat.

[a] Laws of Oleron, art. v, and Laws of Wisbuy, art. 17.

Art. XXVIII. as soon as they are commanded: and he who stays or lies ashore, shall pay a forfeit, or suffer imprisonment.

ART. XXIV.

Voyage changed, mariners to be compensated. If the master changes his voyage, and steers another course than was intended, he ought to have the consent of his mariners, or pay them what the major party of them shall adjudge to be due to them for his changing of the voyage: and if then any one of them will not obey him, he shall be punished as a mutineer.

ART. XXV.

Mariner sleeping on his watch. If any mariner sleep on a watch, he shall pay four sols forfeit: and whoever finds him asleep, and does not discover it, two sols.

ART. XXVI.

Boats not to be moored on a ship's side. All seamen are forbidden to moor any skiffs or boats to a ship's side, on pain of imprisonment.

ART. XXVII.

Mariner incapable of performing his duty, to forfeit his wages. He who shall be found incapable of discharging his duty as a pilot or mariner, for which he has received wages, shall forfeit all that was promised him, and be besides punished according to his demerit.

ART. XXVIII.

When wages are to be paid to the mariners. Masters shall pay their seamen at three payments, one third when the ship sets sail, outward bound;

one third when she is unloaden, and the other when she is returned home. Art. XXXIII.

ART. XXIX.

A master may at any time turn away a mariner that rebels against, or is unfaithful to him.[a] Mariner rebellious may be discharged.

ART. XXX.

If one mariner kills another, the master is bound to seize him, and keep him in safe custody till he arrives at his port, and then to deliver him up to justice to be punished. Mariner committing murder.

ART. XXXI.

The seamen may not feast and carouse in the ship without the master's leave, on pain of losing half their wages. Seamen not to feast on board the ship.

ART. XXXII.

No seaman shall let his wife lie aboard under penalty of 50 sols. Seaman's wife not to lie on board.

ART. XXXIII.

No seaman ought to carry powder and shot without the master's consent, on pain of paying double the value of it. Seamen may not carry ammunition.

[a] Laws of Oleron, art. xii. & xiii.

Art. XXXVIII.

ART. XXXIV.

Master when he returns, to give an account of forfeitures received.

The master is bound when he returns home, to give an account before the magistrate, of what forfeitures he received, and for what, under penalty of 25 crowns.

ART. XXXV.

Seamen must defend the ship; if wounded they must be cured, if maimed supported during their lives at the expense of the ship.

The seamen are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded, they shall he healed and cured at the general charge of the concerned in a common average. If any one of them is maimed and disabled, he shall be maintained as long as he lives by a like average.

ART. XXXVI.

Mariners refusing to defend the ship.

If the mariners, or any of the company refuse to assist on the like occasion, and the ship be taken or lost, they shall be condemned to be whipped as cowards and rascals.

ART. XXXVII.

Master afraid to defend the ship.

If the mariners resolve to defend the ship, and the master is afraid and against it, he shall be turned out of his post with infamy, and declared incapable of ever commanding a ship afterwards.

ART. XXXVIII.

Discharge of ship's ballast.

The ship's ballast shall be carried to the place

designed for it, and those that are refractory, and will not help in it, shall be punished by the magistrates of the place. Art. XLII.

ART. XXXIX.

If any seaman is wounded in the ship's service, he shall be cured at the charge of the ship, but not if he is wounded otherwise.[a] Seaman wounded in the service of the ship.

ART. XL.

If any one of the seamen goes ashore without leave, and the ship happens to receive any damage in the time, or to be lost for want of hands, he shall be kept in prison upon bread and water for one year; and if any seaman dies or perishes with the ship for want of the assistance of the absent seaman, the latter shall be punished with corporal punishment.[b] Seamen going on shore without leave—Injuries to the ship or her crew in his absence.

ART. XLI.

If a mariner behaves himself ill the master may turn him off; but if he discharge him for no reason before the voyage begins, he shall pay him a third part of his wages, but shall not charge it in the ship's account. Mariner misbehaving.

ART. XLII.

If the master discharges a seaman during the Discharge of a mariner by the master.

[a] Laws of Oleron, art. vi, and Laws of Wisbuy, art. xviii.
[b] Laws of Oleron, art. xx.

Art. XLV. voyage, for no lawful cause given, he is bound to pay him his whole wages, and defray the charge of his return; but if the mariner desires the master's leave to quit the ship, he shall be bound to restore all the money he received, and pay his own charges.[a]

ART. XLIII.

Seamen deserting. If an officer or seaman quits a ship, and conceals himself; if afterwards he is apprehended, he shall be delivered up to justice to be punished: he shall be stigmatized in the face with the first letter of the name of the town to which he belongs.

ART. XLIV.

Vessel wrecked, seamen to assist and to receive reward. If a ship is lost the mariners are obliged to save as much of the goods as they can, and the master ought to reward and satisfy them for it, and pay the charge of their journey home: if the mariners refuse to assist the master, they shall have neither wages nor reward.[b]

ART. XLV.

Mariner falling sick. If any mariner falls sick of any disease, he shall be put ashore and maintained in like manner as if he was on shipboard, and be attended by another mariner.[c] However, the master is not obliged to stay for him; if he recovers his health, he shall be paid his wages as much as if he had served out the whole

[a] Laws of Oleron, art. xviii. [b] Ibid. art. iii.
[c] Ibid. art. vii.

voyage; and in case he dies, his heirs shall have what was due to him.* Art. XLVIII.

ART. XLVI.

If mariners mutiny, and force the master to enter into any harbour or port, and the ship or cargo is lost, either in whole or in part, for which the seamen run away; if afterwards they are taken, they shall be corporally punished. Mutiny.

ART. XLVII.

The master shall not give the seamen any cause to mutiny, but supply them with what is convenient, and pay them what is their due punctually and faithfully.[a] Master to perform his contract with mariners.

ART. XLVIII.

The master who shall debauch a seaman, and hire him after he had hired himself to another master, shall pay 25 livres, and the mariner shall pay to the first master for damages, half the wages the second had promised him. Master enticing away a mariner.

[a] Laws of Oleron, art. xiii.

* The Spaniards are the most unkind, and indeed unjust, to their sick mariners of any people: for they neither pay them any wages, nor maintain them, unless they pay for others to serve in their stead: and what is still worse, if during their sickness any accident or damage happens to the ship or goods, those mariners that were ill, are obliged to make satisfaction, their sickness being no plea for them, according to the *Laberinto de Comercio, libro tertio, cap. Navigantis, numero* 18.

Art. LII.

ART. XLIX.

Vessel delayed in a foreign port.

If a ship is stopped in a strange country, or the mariners are forced to stay there for their freight, or on another account, they shall all that time be maintained as is usual; but shall not pretend to demand any extraordinary wages; and what is due to them shall be paid to them or their assigns, when the ship is discharged. If any seaman is so bold as to leave the ship because of her stay, he shall be corporally punished according to his demerits.

ART. L.

A portion of the freight on gold, silver and diamonds allowed to the master.

If a master takes any gold, silver, diamonds, or other merchandize of great price, which obliges him to have a more than ordinary care of it, a fourth part of the freight of such rich goods shall be allowed him, and the owners shall have the other three fourths.

ART. LI.

Master to put a mariner in each lighter.

The master ought to put a mariner in each boat or lighter that is to carry salt to land, as well to take care of it, as to see that a right account is kept of its measure.

ART. LII.

Provisions allowed to mariners.

Mariners hired aboard ships bound for *France* or *Spain*, shall not be maintained by the masters when they are outward bound, but shall live on their own provisions; but when they are homeward

bound, the master shall maintain them: and if the master advances or lends them any money, he may pay himself by deducting it out of their wages. If the ship is not loaden home, the master is not obliged to maintain them. Art. LVI.

ART. LIII.

The masters may not alienate or sell any part of their provisions or furniture until the voyage is made, and when they do, the owners shall be preferred to any other in the sale of them. Masters cannot sell their provisions during the voyage.

ART. LIV.

The mariners shall not take any grains of salt belonging to the ship's loading, but shall put some aboard for their own use, with the knowledge and consent of the merchant or others concerned, on pain of being severely punished. Mariners to furnish themselves with salt.

ART. LV.

The master or the pilot may each load 12 barrels on their particular account; the other officers six each, and the seamen four each; the cook and the boys two each.* Freight allowed to the officers and crew.

ART. LVI.

If a master, to displease his owners, sells his part Master disposing of his ship.

* This is what is called portage in France, where 12 barrels make a last, and one last 2 tons.

Art. LIX. of a ship for more than it is worth, the said part shall be appraised by men of experience; after which the owners may take it or leave it at the price it was appraised at, as they think fit[a]

ART. LVII.

Master fraudulently borrowing money on bottomry.

If a master, fraudulently, shall borrow money upon bottomry, and mortgage his ship for it, or stay with it in any port a long time, and sell it, together with the merchandize, the said master shall be incapable of having the command of a ship afterwards, and never be admitted into any city, but shall be punished without mercy.

ART. LVIII.

Master may borrow money on bottomry, pledging his part of the ship.

A master being at home, may not borrow any more money on bottomry, than his own part of the ship is worth; if he does, the other shares of the ship shall not be liable for it; neither shall he take any freight without the knowledge and consent of the owners.

ART. LIX.

Disputes between part owners of ships.

If the owners are at variance, and cannot agree about the freight of their ship, that opinion shall carry it, which has the majority on its side by two or three. The master may also in such case, take up money upon bottomry, as well on their shares who do not consent, as on theirs who do.

[a] Laws of Oleron, art. xlv.

BOTTOMRY.

Art. LX.

ART. LX.

A master being in a strange country, if necessity drives him to it, may take up money on bottomry, if he cannot get it without, and the owners shall bear the charge of it.

Money may be taken by the master on bottomry for necessaries.

[a] Laws of Oleron, art. xxvii, and Laws of Wisbuy, art. xlv.

INDEX

TO THE

APPENDIX OF VOLUME FIRST.*

A

PAGE.

Anchorage of vessels in port. - - - - - i
Average. Goods thrown overboard from a vessel in distress become a general average. - - - - - xviii
——— Masts, cables, &c. cut away in distress must be charged as an average. - - - - - - - xix
——— Merchandize thrown over-board an average. - lxxxi
——— Cargo taken out of ships striking each other to become an average. - - - - - - - - - lxxxvi
——— Masters must contribute to average on goods thrown over-board. - - - - - - - - - - lxxxi
——— Expenses of taking goods out of an over-loaded vessel become an average. - - - - - - lxxxvi

B

Boats, how to be moored. - - - - - - cii
Buoys to be put to anchors. - - - - lxxviii, lxxxv
Bottomry. Money borrowed by the master on bottomry. - - - - - - lxxxiii, c, cxi

C

Cables and Anchors left by vessels in distress. - - - lx
Cargo, injuries to it while loading. - - - - - xxiii
——— by bad seamanship. - - - - xxiv
——— while unloading. - - - - xlv
——— Who are answerable for injuries done to it while unloading. - - - - - - - - - - xlv
——— taken out of ships striking, to be averaged. - lxxxvi
Cordage of ships let on freight to be shewn to the freighters. lxxv

D

Demurrage. - - - - - - - xxxvi
Discharge of a vessel, time allowed for it. - - - lxxxv

E

Expenses of goods taken out of a vessel over-loaded to be averaged. - - - - - - - - lxxxv

* For the Index to the Admiralty Decisions, see vol. II.

PAGE

F

Fish found or taken up. - - - - lv—lviii
Freight to be paid in proportion to the voyage performed by a vessel become unseaworthy. - - - xix
——— not to be charged on goods thrown over-board from a vessel in distress. - - - - - xxii
——— to mariners regulated - - - xxx, lxxviii, cix
——— Change of the voyage of a vessel on freight. - lxxii
——— on goods saved from wreck to be paid *pro rata*. - lxxiii
——— Lien of the master on goods for freight. - - lxxxvii

G

Gold and silver found on the sea-coast. - - liii
Goods taken from a vessel wrecked. - - xlviii
——— thrown over-board in time of distress. - lxxiv, lxxv, lxxxi
——— where derelict. - - - - li, lii
——— found at sea. - - - - - lii
——— found on shore. - - - - - lvii
——— saved from a wreck, freight to be paid *pro rata*. - lxxiii
——— taken on board without the master's consent. - lxxxiii

H

Hanse Towns, laws of - - - - xcvi
——— History of the Hanse Towns and their laws. xciii
Harbour. Vessels at anchor in a harbour. - lxxvii, lxxviii

I

Inventory of articles wanted for the ship to be made out by the master. - - - - - - xcvii

L

Laws of Oleron. - - - - - i
——— Their date and promulgation. - lxii, lxiii
——— of Wisbuy. - - - - - lxvii
——— of the Hanse Towns. - - - - xcvi
Lien of the master on goods for the freight. - lxxxvii
Loading of ships. - - - - - xc
——— Injuries to cargo while loading. - - xxiii

M

Mariners must exert themselves to save goods from wreck. - - - - - viii, lxxiii
——— to receive a compensation out of the goods saved. viii, cvi
——— not to leave the ship when in port without the master's consent. - - - - xi, lxxiii, ci
——— injuring each other when intoxicated. - xiv
——— must be cured of wounds received in quarrels with each other at their own expense. - - - xiv
——— wounded in the ship's service. xv, lxxiv, lxxviii, civ, cv

PAGE

Mariners falling sick during the voyage must be provided for. - - - - xvi, lxxiv, cvi
——— left on shore without lawful cause must have wages. xvi
——— dying during the voyage their heirs shall have their wages. - - - - - xvii
——— Quarrels of mariners with the master. - xxvi
——— Quarrels with each other. - - - xxvii
——— tendering amends must be received on board after having committed a fault. - - xxvii, lxxvii
——— Provisions allotted to them. - xxxi, lxxviii, ci, ciii
——— going on shore while the vessel is in port. xxxiv, lxxviii, ci, ciii
——— answerable for the consequences of their absence. - - - - xxxiv, lxx, cv
——— escaping from shipwreck to be protected on shore. xlix
——— neglecting to perform their contracts. - lxix
——— incompetent to perform their duty. - - lxix, cii
——— dismissed by the master before sailing. - - lxx
——— dismissed after sailing, and without lawful cause to receive wages for the voyage. - - - lxx, cvi
——— wages for unloading. - - - lxx
——— to be exempt from arrest. - - - - *ib.*
——— to give security when they receive part of their wages. - - - - lxxviii
——— contracting for part of the freight. - - lxxix
——— must be compensated for unloading the ship and for attention to the cargo. - - - lxxxiv
——— must inform the master of the situation of the cordage. - - - - - *ib.*
——— When they may leave the ship the voyage being ended. - - - lxxxvi
——— deserting from the ship—punishment. lxxxvii, cvi
——— infected with a contagious disorder. - lxxxviii
——— must produce certificates of their good character before they are employed. - - - - c
——— when on shore with the master must take care of the boat. - - - - - ci
——— to be compensated, when the voyage for which they shipped is changed. - - - - cii
——— sleeping on their watch. - - - *ib.*
——— When rebellious they are to be discharged. - ciii
——— must defend the ship when she is in danger. - civ
Master cannot sell the ship. - - v, lxxii
——— may pledge her for necessaries. - *ibid.*
——— must consult the ship's company before sailing. vii, lxxii
——— quarrels with mariners at sea. - - xxvi
——— exempted from arrest. - - - lxx
——— must moor his ship well. - lxxx
——— may refit his ship when injured in a storm. - *ib.*
——— must contribute to the average on goods thrown overboard. - - - - lxxxi
——— may employ pilots. - - lxxxii
——— must with mariners protest when entering a port in distress. - - - - lxxxv
——— has a lien on goods for freight. - lxxxvii
——— disputes with owners. - - lxxxviii

PAGE

Master to be reimbursed for expenses in repairing his ship by owners. - - - lxxxviii
——— to have a portion of the freight of gold or silver. cviii
——— fraudulently borrowing money on *respondentia*. - cx
——— cannot purchase on account of the ship without the owner's consent. - - xcvii
——— not delivering all the cargo to be accountable. - xcviii
——— must give mariners certificates of their conduct. ci
——— must perform his contract with the mariners. - cvii
——— enticing mariners from other employment. - *ib.*
Masts and Sails lost. - - lxxii
Merchandize found on the sea-shore. - - lvii
——— Part of the merchandize on board may be sold by the master in time of distress. - - lxxx
——— Seamen must watch merchandize. - lxxxiv
——— lost by striking of ships against each other. lxxxix
——— sold by owner of the ship. - *ib.*
——— sold by the master. - - *ib.*
Mutiny. - - - - cvii

O

Owners. Differences with the master. - lxxxviii
——— must repay master expenses of repairing the vessel. *ib.*
——— may sell part of the merchandize for the ship's use. lxxxix
——— *and masters*. - - xcix
——— may discharge the master. - - *ib.*
——— must not employ a master without he produces evidence of good character. - - c
——— must be consulted about the wages of mariners. *ib.*
——— Disputes between part owners of ships. - cx

P

Pilots failing to perform their duty. - xxxviii
——— Punishment of an ignorant pilot. - *ib.*
——— running a vessel on shore intentionally. - xxxix
——— Persons encouraging pilots to run their vessels on shore. - - - xxxviii
——— may be hired by masters of vessels. lxxxii, lxxxvii
Pirates. Goods of pirates thrown on shore not to be preserved for them. - - - lxii
Promises made during a time of distress not binding. ix, xlvii
Provisions allowed to mariners. - xxxi, lxxviii, ciii
——— not to be sold by the master, except to vessels in distress. - - lxxxviii, cix
——— to be delivered up by the master if any remain when the voyage is ended. - - lxxxviii

Q

Quarrels between master and mariners. - xxvii
——— between mariners. - xxxiii, lxxvii

PAGE

R

Repairs of the ship by the master. - lxxxviii, xcvii

S

Salvage. - - - ix, xlvii
Sailing of ships from port. - - lxxxix
Seamen, see *mariners*.
Ships, see *Vessels*.
Ship in distress at sea. - - - xix
—— let on freight, cordage must be shewn to the freighter. xxiii
—— ill-trimmed by the master. - - lxxv
—— striking against another. - - lxxxiv
—— under sail injuring each other. - xc
Supplies. Vessels in want of supplies. - - xxxvii

T

Time of payment of mariners' wages. - cii

U

Unloading. Wages to mariners for unloading. - lxx

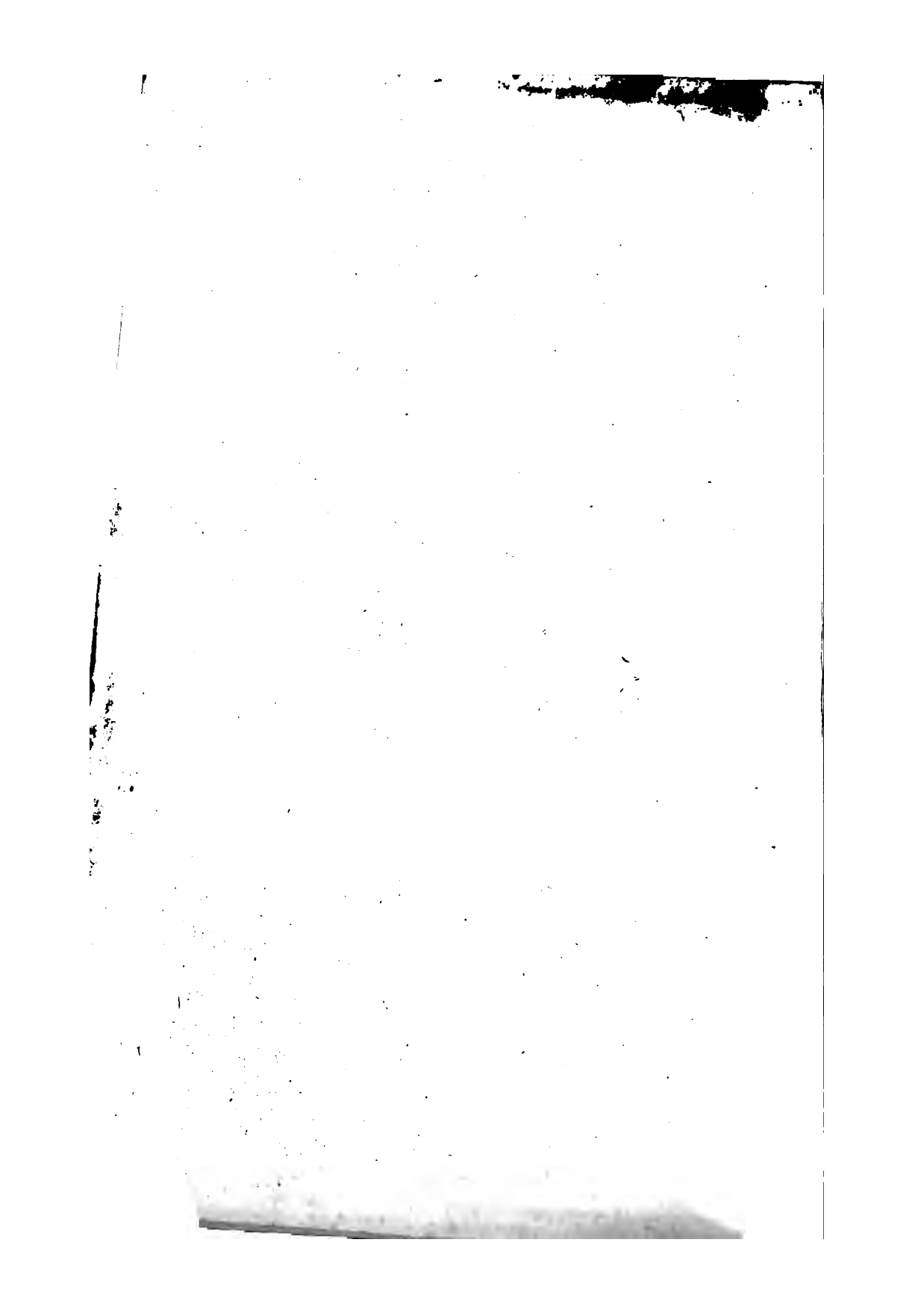
V

Vessel rendered unseaworthy during her voyage. - ix
——— in distress master may throw part of cargo overboard. - - xviii
——— injuring each other. - xxviii, lxxvii
——— Anchorage regulated. - - xxix
——— in port wanting supplies. - xxxvii
——— run on shore by a pilot. - - xxxix
——— wrecked. - - - xlvii
——— Parts of the wreck to be preserved for the owners. lxi
——— when on freight not to be sold or mortgaged. - lxxi
——— delayed in a foreign port. - cviii
——— Loading of vessels. - - xc
Voyage ended, when mariners may leave the ship. - lxxxvi
——— changed, mariners to be compensated. - - cii

W

Wages, see *Mariners*.
——— Part of mariners' wages may be retained until the ship returns. - - - xxxiii
——— Contracts with mariners for part of the freight in lieu of wages. - - - *ib*.
——— When wages are to be paid to mariners. - lxvii
Witnesses. Mariners witnesses. - - lxxi





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